Pathma d/o Naganather & Anor v Nivedita d/o Naganather (No 1)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S–5–22–189 OF 2000
ABDUL MALIK ISHAK J
20 FEBRUARY 2002

***Civil Procedure** — Injunction — Ex parte injunction — Application to extend injunction — Duty of applicant when making an ex parte application for injunction*

***Civil Procedure** — Injunction — Ex parte injunction — Application to extend injunction — Whether there was full disclosure of material facts — Whether there was an absolute right to set aside an ex parte injunction that had been obtained without full disclosure — Whether court had discretion to grant the continuation of the ex parte injunction or to grant a fresh injunction at the inter partes stage if ex parte injunction had been obtained without full disclosure*

***Civil Procedure** — Injunction — Ex parte injunction — Application to extend injunction — Whether there were serious questions to be tried — Balance of convenience — Whether damages would be an adequate remedy*

This was an application by the plaintiffs to extend the ex parte interim injunction granted by the court on 20 March 2000. The interim injunction was to, inter alia, restrain the plaintiff's sister ('the defendant'), her servants and/or agents from evicting the plaintiffs from the premises at No 18, Lorong Maarof, Off Jalan Bangsar, Kuala Lumpur ('the said property'). The defendant was the registered owner of the said property. The defendant's late father had purchased the said property in 1958. Back then, the said property was registered in the two names, one half in late father's name and the other half in his oldest son's ('Kandasamy') name. The said property was now worth RM2.9m. The plaintiffs' stand was that the said property was held by the defendant in trust for all the brothers and sisters, including the plaintiffs. The defendant, on the other hand, stated that the plaintiffs were mere licensees and that the said property was transferred to her in consideration of monetary contribution made by her towards the construction of the said property.

Held, allowing the plaintiffs' application:

(1) At an ex parte application for an interim injunction, it was the duty of the applicant (ie the plaintiffs in the instant case) to: (a) make the fullest disclosure of all material facts within the applicant's knowledge, including negotiations carried out on a 'without prejudice basis'; (b) disclose any anticipated defence; (c) make proper inquiries of any additional facts in all the circumstances of the case; (d) comply with O 29 r 2A(c) of the Rules of the High Court 1980; and (e) show that the applicant had the ability to satisfy the undertaking to pay damages in the event

it was found that the ex parte injunction should not be given. In the instant case, the plaintiffs had satisfied these requirements (see pp 395C–D, F, 398A, 406E, 407E-F).

(2) Although the applicant had to disclose all the material facts within their knowledge at an ex parte stage, even if they had failed to do so, the court (at the inter partes stage), had the discretion to either grant the continuation of the ex parte injunction or to grant a fresh injunction because there was no absolute right to set aside an ex parte injunction that had been obtained without full disclosure (see p 410B–C).

(3) In the instant case, there were serious questions to be tried and the balance of convenience tilted in favour of the plaintiffs. Further, based on the available affidavit evidence, damages would not be an adequate remedy because the said property would have been disposed of and the sale proceeds dissipated by the defendant (see p 431E–F).

[**Bahasa Malaysia summary**

Ini adalah satu permohonan oleh plaintif-plaintif untuk melanjutkan injunksi interim ex parte yang telah dibenarkan oleh pada 20 Mac 2000. Injunksi interim tersebut adalah untuk, antara lain, menyekat kakak plaintif ('defendan'), pekerja-pekerja dan/atau ejen-ejen beliau daripada menghalau plaintif-plaintif daripada premis di No 18, Lorong Maarof, Off Jalan Bangsar, Kuala Lumpur ('hartanah tersebut'). Defendan adalah pemilik berdaftar hartanah tersebut. Arwah bapa defendan telah membeli hartanah tersebut pada tahun 1958. Pada ketika itu, hartanah tersebut dinamakan atas dua penama, satu bahagian atas nama arwah bapa beliau dan satu bahagian lagi atas nama anak sulung beliau ('Kandasamy'). Hartanah tersebut sekarang bernilai RM2.9m. Pendirian plaintif-plaintif adalah bahawa hartanah tersebut telah dipegang secara amanah oleh defendan untuk semua adik beradik lelaki dan perempuan, termasuklah plaintif-plaintif. Defendan, sebaliknya, menyatakan bahawa plaintif-plaintif hanyalah pemegang-pemegang lesen dan bahawa hartanah tersebut telah dipindahkan kepada beliau sebagai balasan sumbanagn kewangan yang telah dibuat oleh beliau terhadap pembinaan hartanah tersebut.

Diputuskan:

(1) Dalam permohonan ex parte untuk satu injunksi interim, ia menjadi kewajipan pemohon (iaitu plaintif-plaintif dalam kes ini) untuk: (a) membuat pendedahan sepenuhnya tentang semua fakta-fakta material dalam pengetahuan pemohon, termasuklah rundingan yang diadakan di atas 'without prejudice basis'; (b) mendedahkan apa-apa pembelaan yang dijangkakan;

(c) membuat siasatan yang betul tentang apa-apa fakta-fakta tambahan dalam semua keadaan kes; (d) mematuhi A 29 k 2A(c) Kaedah-Kaedah Mahkamah Tinggi 1980; dan (e) menunjukkan pemohon mempunyai keupayaan untuk memenuhi akujanji untuk membayar ganti rugi sekiranya ia didapati bahawa injunksi ex parte tersebut tidak patut diberikan. Dalam kes ini, plaintif-plaintif telah memenuhi keperluan-keperluan tersebut (lihat ms 395C–D, F, 398A, 406E, 407E-F).

(2) Walaupun pemohon perlu mendedahkan semua fakta yang material di dalam pengetahuan mereka di peringkat ex parte, sekalipun mereka gagal berbuat demikian, mahkamah (di peringkat inter partes), mempunyai budi bicara untuk sama ada membenarkan injunksi ex parte diteruskan atau untuk membenarkan injunksi baru kerana tidak terdapat hak mutlak untuk mengenepikan injunksi ex parte yang telah diperolehi tanpa pendedahan sepenuhnya (lihat ms 410B–C).

(3) Dalam kes ini, terdapat persoalan-persoalan serius yang perlu dibicarakan dan imbangan kesesuaian lebih menyebelahi pihak plaintif-plaintif. Tambahan lagi, berdasarkan keterangan afidavit yang ada, ganti rugi bukan satu remedi yang mencukupi kerana hartanah tersebut akan dilupuskan dan hasil jualan dibazirkan oleh defendan (lihat ms 431E–F).]

Notes

For cases on ex parte injunctions, 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2507–2543.

Cases referred to

Allen & Ors v Jambo Holdings & Ors [1980] 2 All ER 502 (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)
Associated Tractors Sdn Bhd v Chan Boon Heng & Anor [1990] 2 MLJ 408 (refd)
Boase v Cluny Rubber Estate Ltd (1913) 1 FMSLR 130 (refd)
Brigid Foley Ltd v Ellott & Ors [1982] RPC 433 (refd)
Brink's–MAT Ltd v Elcombe & Ors [1988] 3 All ER 188 (refd)
Castle Fitness Consultancy Pte Ltd v Manz [1990] 1 MLJ 141 (refd)
Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors [1989] 1 MLJ 426 (refd)
Cutts v Head [1984] 1 All ER 597 (refd)
Dharmaratna v Dharmaratna [1939] MLJ 310 (refd)
Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd [1988] 3 MLJ 197 (refd)
Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors [1999] 5 MLJ 449 (refd)

Er Eng Hong & Anor v New Kim Eng @ Neo Kim [1999] MLJU 605; [2000] 1 CLJ 289 (refd)

Family Housing Association (Manchester) Ltd v Michael Hyde & Partners (a firm) & Ors [1993] 2 All ER 567 (refd)

Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290 (refd)

Gerak Indera Sdn Bhd v Farlim Properties Sdn Bhd & Ors [1997] 3 MLJ 90 (refd)

'Giovanna', The; Gulf Interstate Oil Corp LLC and the Coral Oil Co Ltd v Ant Trade & Transport Ltd of Malta [1999] 1 Lloyd's Law Report 867 (refd)

House of Spring Gardens Ltd & Ors v Waite & Ors [1990] 2 All ER 990 (refd)

Intercontex & Anor v Schmidt & Anor [1988] Fleet Street Reports 575 (refd)

JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd [1987] 1 MLJ 312 (refd)

Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Kinch v Walcott & Ors [1929] AC 482 (refd)

King, The v The General Commissioners for the Purpose of the Income Tax Act for the District of Kensington; ex p Princess Edmond de Polignac [1917] KBD 486 (refd)

Koh Ying Huat v Koh Kah Hing Sdn Bhd [1992] MLJU 2; [1994] 3 CLJ 777 (refd)

Lart Wilkinson v Blades, In re [1896] 2 Ch 788 (refd)

Lee Sock Goh v Straits Cabaret (1953) Ltd [1965] 2 MLJ 3 (refd)

Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 (refd)

Lim Nyook Yin v Ultratech Sdn Bhd & Anor [1995] 1 MLJ 498 (refd)

Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd [1993] 3 MLJ 527 (refd)

Lim Tjoen Kong v AB Chew Investments Pte Ltd [1991] 3 MLJ 4 (refd)

Lloyds Bowmaker Ltd v Brittania Arrow Holdings plc; Lavens (Third Party) [1988] 3 All ER 178 (refd)

Marchant v Charters [1977] 3 All ER 918 (distd)

Mayor Alderman and Burgesses of the Borough of Southgate v Watson [1944] 1 All ER 603 (refd)

McFadden v Snow (1952) 69 The Weekly Notes 8 (refd)

Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605 (refd)

Muschinski v Dodds (1985) 160 CLR 503 (refd)

Oh Kuang Liang v Associated Wood Industries Sdn Bhd [1995] 4 MLJ 390 (refd)

Paruvathy d/o Murugiah v Krishnan s/o Doraisamy [1983] 2 MLJ 121 (refd)

Pitts v Adney [1961] 78 WN (NSW) 886 (refd)

A *Punca Klasik Sdn Bhd v Foh Chong & Sons Sdn Bhd & Ors* [1996] MLJU 471; [1998] 1 CLJ 601 (refd)

Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Law Report 428 (refd)

United Gold Holdings Sdn Bhd v Malaysia Mining Corp Bhd & Anor [1987] 2 CLJ 272 (refd)

B *Wan Naimah v Wan Mohamed Nawawi* [1974] 1 MLJ 41 (refd)

Wong Sai Tack v Chien Hon Keong [2000] 1 CLJ 195 (refd)

Yew Phaik Hoon v Quah Ooi Keat & Anor [1969] 1 MLJ 32 (refd)

Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4) [1998] 7 MLJ 551 (refd)

C

Legislation referred to

National Land Code 1965 ss 89, 340

Penal Code ss 193, 199, 200

D Rules of the High Court 1980 O 29 r 2A(c), O 34 r 4(2)(a)–(m), O 35A r 1

Specific Relief Act 1950 s 7(2)

Statutory Declaration Act 1960 s 3

Devahi Rosalind John (*Atma Singh Veriah & Co*) for the plaintiffs.

E *A Kanesalingam* (*K Shanmuga* with him) (*Kanesalingam & Co*) for the defendant.

Abdul Malik Ishak J:

Background

F This was an application by the plaintiffs in encl 11 to extend the ex parte interim injunction granted by this court on 20 March 2000. The application for the ex parte interim injunction can be seen in encl 5 and in that enclosure, the prayers sought for were:

G (1) to restrain the defendant, her servants and/or agents including S Viswanathan until further order from evicting the plaintiffs from the premises at No 18, Lorong Maarof, Off Jalan Bangsar, 59000 Kuala Lumpur ('the said property' or the 'property');

H (2) to restrain the defendant, her servants and/or agents including S Viswanathan until further order from harassing, disturbing or threatening the plaintiffs from residing at the said property;

(3) to restrain the defendant, her servants and/or agents including S Viswanathan until further order from selling, disposing or dealing with the land held under Grant No 26492, Lot 211, s 96, Kuala Lumpur on which house No 18, Lorong Maarof, Off Jalan Bangsar was built — referring to the said property;

I (4) that costs of the application be costs in the cause; and

(5) any other relief that this court deems fit to grant.

In due course, to be precise on 20 March 2000, after hearing the submissions of the plaintiffs' counsel, I gave an order in terms of encl 5 prayers (1), (2), (3), (4) and I too ordered the plaintiffs to give an undertaking as to damages. The return date was then fixed on 30 March 2000.

In due course, I heard the submissions of the parties in regard to encl 11 on staggering basis.

Facts of the case

Within a narrow compass, the facts may be stated thus.

The parties to the suit are the brothers and sisters and the lawful children of the late Naganather and the late Mdm Manickam. Everything revolved on the property. Greed was the root cause of the squabbles between the siblings.

The defendant is still the registered owner of the property. That property was first purchased in 1958 by the late father and registered in the name of the late father and a brother of the defendant by the name of Kandasamy. In short, in 1958 the property was registered in two names, one half in the late father's name and the other half in the name of Kandasamy — the eldest son. This seemed to be the custom among the Ceylonese community and, of course, Kandasamy did not pay for that half share.

Initially, the property was a piece of vacant land. A house was constructed and that construction started in 1960 before the death of the late father. By October 1960, the house was constructed with monies contributed by all the working members of the family and loans taken by the late mother from friends. The late father died on 1 April 1960. The late mother also died at a later date.

The defendant verily believed that she had contributed RM10,000 towards the construction of the house. She too verily believed that her late mother had contributed RM2,000 and that the rest came from borrowing. However, the defendant did not disclose the source of her belief. The defendant denied that the first plaintiff had paid and contributed towards the construction of the house. With a house built on the land, the property has now become, by virtue of its strategic location, the focal point of attention of the quarrelsome siblings. The defendant alleged that by reason of her contribution, Kandasamy's half share was transfered to her. The plaintiffs, however, took the stand that the half share belonging to Kandasamy was transferred to the defendant on the mother's instructions because Kandasamy was indebted and that this was done in order to avoid the creditors from selling the trust property. It must be borne in mind that the fact that Kandasamy was indebted was not disputed at all.

The plaintiffs' stand was quite simple. That the property is currently held by the defendant in trust for the brothers and sisters including the plaintiffs. It was pointed out that the first plaintiff is a sister of the defendant and has been occupying a room in the said property together with another sister by the name of Siva Ananda Devi, and the defendant said that these two occupants were nothing more than mere licensees. It was also pointed out that the second plaintiff had moved into one room in the said property in 1995 with his daughter but somehow had moved out soon after and the second plaintiff had locked that room and parked two of his vehicles in the compound. It was said that the second plaintiff had moved in as a mere licensee.

Through her solicitors, the defendant had issued letters to both the first and the second plaintiffs giving them seven days to vacate the property. Obviously, the plaintiffs refused to vacate the said property because they argued that the property is trust property held in trust for all the brothers and sisters including the plaintiffs. Again through her solicitors, the defendant threatened to use judicial and extra judicial means to evict the plaintiffs from the said property.

The defendant vehemently denied that the property is trust property. She too denied that she held the property in trust for her brothers and sisters. The defendant said that she is the sole and the absolute owner of the said property and in support of her stand, she pointed out that the title to the property bears her name as the sole registered proprietor. The plaintiffs disagreed and challenged that the defendant is the sole absolute owner of the said property and the plaintiffs said that the defendant is a mere trustee of the said property.

The defendant was quite adamant. She reiterated that she had purchased the other half of the undivided share from her mother for valuable consideration using her staff housing loan as a government servant in 1983. It was averred that from 1962, none of the brothers and sisters claimed that the defendant was a mere trustee of the property. It was also averred that in 1995, the second plaintiff by way of a ruse had got the defendant to transfer the property to the second plaintiff on some pretext but the defendant quickly took out a legal action vide Civil Suit No S2–22–263–97 against the second plaintiff in 1997 in the High Court in Kuala Lumpur to recover the property. The second plaintiff defended that court action with a counterclaim wherein the second plaintiff stated that the property was in fact held by the defendant as a trustee. In that action, the defendant succeeded in obtaining a consent order on 16 June 1999 for the property to be re-transferred to the defendant in her personal name. The property was then duly re-transferred and registered in the personal name of the defendant.

The facts surrounding the property were not that clear cut. Both sides sought to outwit one another by highlighting certain features that they thought were beneficial to them.

The relevant affidavits

The application in encl 11 was supported by the first plaintiff's supporting affidavit that was affirmed on 17 March 2000 which was styled as the plaintiffs' first affidavit as seen in encl 4. It was also supported by an affidavit affirmed on 27 March 2000 which was styled as the plaintiffs' second affidavit as seen in encl 10 and this was followed by a further affidavit affirmed on 3 April 2000 which was styled as the plaintiffs' third affidavit as reflected in encl 13. The plaintiffs too filed a further affidavit with the permission of this court and that further affidavit was affirmed on 27 April 2000 which was styled as the plaintiffs' fourth affidavit that can readily be seen in encl 22.

The defendant on her part had filed three affidavits. One affidavit referred to as the defendant's first affidavit was affirmed on 22 March 2000 which was marked as encl 8. The other affidavit was affirmed on 29 March 2000 which was styled as the defendant's second affidavit as seen in encl 12. The last affidavit was affirmed on 4 April 2000 which was referred to as the defendant's third affidavit and this can be seen in encl 14.

In addition to these affidavits, other affidavits that will be referred to will be mentioned in this judgment from time to time.

Arguments advanced by the parties

In regard to the ex parte injunction that was granted on 20 March 2000, it was argued that there was non-disclosure of material facts during the hearing of the ex parte injunction application. It was also argued that the plaintiffs had made misrepresentations to this court when applying for the ex parte injunction. I will now allude to and examine these arguments.

It was pointed out that para 8 of the statement of claim categorically stated that the property was originally registered in the name of the late father and brother as trustees. But in the affidavit of the first plaintiff as seen in para 10 of encl 4, it was averred that the property was originally registered in the name of the late father and brother as trustees for all the children. All these assertions were said to have been made without supportive documents.

Reference was then made to the photocopy of the title document that was annexed as exh 'NN3' to the affidavit of the defendant as seen in encl 8. That photocopy of the title document showed that on 1 May 1958 the property was registered in the personal names of the late father and brother and not as trustees. It also showed that on 30 May 1962, the half share of the brother was transferred to the defendant in her personal name. Paragraph 21 of encl 41 was also referred to and that paragraph showed that the plaintiffs had a copy of the title document with them all the time but both of them failed to disclose these salient facts but instead sought to misrepresent the facts.

The statement of claim was again alluded to. This time it was in reference to para 10 where the first plaintiff claimed to have contributed to the construction of the house in 1960. By comparison, encl 4 was referred to where at para 12 thereto, the first plaintiff stated that the construction of the house was commenced before the death of the late father and it was further averred that the said construction was completed after the death of the late father, and it was also averred that the first plaintiff had contributed towards the cost of construction of the said house. These averments in para 12 of encl 4 were vigorously attacked. It was submitted that the first plaintiff had failed to state how much money that she had paid towards the cost of constructing the house, and she too had failed to state as to the source of that money and how much she was earning at the material time.

Next, reference was also made to the defendant's first affidavit as seen in encl 8 and at para 9 thereto, it was averred that the defendant received RM10,000 as compensation for the injuries suffered in an accident and as documentary proof thereto, she relied on a letter of offer for the compensation money emanating from a firm of solicitors practising at that time under the name and style of Messrs Bannon & Bailey dated 26 October 1960 and that letter of offer was marked as exh 'NN2' in encl 8. The defendant also averred that the first plaintiff was in no position to contribute as she was earning a salary of RM300 per month at that time and so it was submitted that the allegation that the first plaintiff had contributed to the construction costs of the house in relation to the property must be construed to be totally false.

I pause here for a moment.

It is interesting to note that the plaintiffs were not happy with the contents of the letter from the law firm of Messrs Bannon & Bailey marked as exh 'NN2' of encl 8, and for convenience that letter must now be reproduced:

(Copy)

BANNON & BAILEY,
Laidlaw Building,
Kuala Lumpur.

Our ref. PM/TLH/18488/59
26 October 1960

AK Sen, Esq,
Advocate & Solicitor,
Mountbatten Road,
Kuala Lumpur

WITHOUT PREJUDICE

Dear Sir,

KLHC CS Nos 373 & 378/1960
Nivedita & Manicam Naganather

We refer to the without prejudice negotiations between yourself, Mr Peddie and Mr Shankar.

We have considered this case very carefully and we would write to you as follows:

We think that the case of Mdm Manicam Naganather is very much less complicated than the case of her daughter and we would prefer to deal with this claim first. We have borne in mind that this lady had her leg in plaster for three weeks only and that she seems to have made a very good recovery. The fracture of the ankle has completely healed and is in good alignment. Her status in life is such that she is not called upon to walk long distances and as far as we could observe the limp was very slight. While we would estimate her general damages at RM1,000 only we are prepared to offer the sum of RM2,000 in full and final settlement of all her claims. We consider that this amount is not only adequate but also quite generous.

To take the case of Nivedita, we have borne in mind that to all outward appearances the accident seems to have left no after effects and there is no disfigurement of any kind. She was detained in hospital for only 14 days although she appears to have been on medical leave for a period of approximately five months. Her only complaint seems to be that her head movement is restricted in that in order to look to the right she has to turn her upper part of her body as well. She has also complained that she cannot wash her hair without experiencing any pain and that in wet weather she gets pains over her left shoulder and in her left arm and leg. You have stated that under loss of amenity she has been precluded from obtaining a scholarship to take a specialist course in physical education and that she has also had to give up various games which she used to play before her accident. Some stress appears to have been laid on the detrimental effect that the injuries would have on her matrimonial prospects.

Apart from the fact that had Nivedita got married she would immediately have been placed by her employers on a temporary basis as a teacher and apart from the fact that had she got married, the question of her continuing as a teacher would be problematical we feel that in the circumstances of this case the question of damages for loss of marriage prospects does not arise. You will agree that there is no question of disfigurement or physical incapacity on her part.

Turning now to the amount which we are offering in full and final settlement of Nivedita's claims we would inform you that we have consulted numerous cases.

For your reference we append hereunder those which we consider apt:

(a) 1956 Current Law Year Book Para 2346
    1 *Maberley v AJ Mackaness* 1,000 pounds
    2 *Pavitt v Washburns & Sons* 350 pounds

(b) 1957 Current Law Year Book Para 963
    1 *Bligh v Union Cartage Co* 1,250 pounds
    2 *Mclaughlin v Claridge* 1,200 pounds

(c) 1959 Current Law Year Book Para 885
    1 *Moss v Court of London Authority* 650 pounds

(d) Current Law June 1960 Para 95
    1 *Turnbull v Notley* 1,250 pounds

In all the above cases there was a restriction of movement and in almost all of them the restriction of movement was to the neck as in Nivedita's case. We think it is important to bear in mind that your client does not have to wear any form of support and besides there has been no actual loss in earnings.

On an average you will observe that the English awards are in the region of 1,000 pounds and we consider that English awards are generally much higher than local ones.

> We therefore offer the sum of RM10,000 in full and final settlement of her claims.
>
> While we have not been able to obtain any corresponding judicial local awards, we feel that you may be interested in the awards made in Singapore Civil Suits Nos 360 of 1956 and 615 of 1964. The relevant detail of these cases are enclosed herewith. We feel it is illuminating to observe particularly in the latter suit that the award of RM15,875 only was made for the very severe injuries which the female in that case sustained.
>
> We shall be obliged if you could let us hear from you at your convenience.
>
> One other point we would like to place on record at this stage is that we have been served with proceedings and have entered appearances but we shall be obliged if you could confirm under open letter that you will extend the time for filing the defence indefinitely subject to the condition that you could give us 14 days notice at any time requiring us to file our defence.
>
> We are authorized by Messrs Drew & Napier, with whom we have been in consultation on the terms of this letter, to say that we send this letter on their behalf as well as on our own.
>
> Yours faithfully,
> Sgd Bannon and Bailey.

The plaintiffs launched a concerted attack against exh 'NN2' of encl 8 and it was pointed out that there were serious discrepancies in that letter. The learned counsel for the plaintiffs emphasized that:

(i) at p 2 of that letter, it ended abruptly with the last line ending in the middle of the page;

(ii) at p 3 of that letter, a different typewriter was used;

(iii) the type print on p 3 was of a larger size than that of the type prints as seen at pp 1 and 2; and

(iv) at p 2, the following words 'continuation from p 1' were not printed thereto.

Now, these discrepancies were sufficiently alluded to in para 10 of the plaintiffs' second affidavit as seen in encl 10 and it was pointed out that the defendant had not made any comments in regard to these discrepancies in the defendant's affidavit in reply as seen in encl 12. It was also emphasized that the letter in exh 'NN2' of encl 8 was unsigned. It was also pointed out that the letter in exh 'NN2' merely contained an offer of RM10,000 and no evidence was adduced to show that the alleged offer was accepted. It was said that the defendant had in her possession documents dating back to the year 1958 and yet she failed to show any documents or vouchers to support the allegation that the sum of RM10,000 had been paid to her for her injuries. The learned counsel for the plaintiffs pointed out that the shroud of secrecy surrounding the letter in exh 'NN2' of encl 8 called for a further investigation which can only be done at the full trial.

Next, it was pointed out that in the statement of claim, the plaintiffs have failed to disclose the presence of the consent judgment in Civil Suit No S2–22–263–97 between the second plaintiff and the defendant and to highlight the material issues in that suit. That consent judgment in Civil Suit No S2–22–263–97 was recorded on June 1999 and it can be seen in exh 'NN19' of encl 8 and it was worded in these words:

> DALAM MAHKAMAH TINGGI DI KUALA LUMPUR
> (BAHAGIAN SIVIL)
>
> GUAMAN SIVIL NO: S2–22–263–97
>
> ANTARA
>
> NIVEDITA A/P NAGANATHER ... PLAINTIF
>
> DAN
>
> ARUMUGASWAMY A/L NAGANATHER ... DEFENDAN
>
> DIHADAPAN YANG ARIF DATO' DR KAMALANATHAN RATNAM
>
> PADA 16 HARIBULAN JUN 1999 DALAM MAHKAMAH TERBUKA
>
> PENGHAKIMAN
>
> TINDAKAN INI telah dipanggil pada hari ini untuk perbicaraan di hadapan Yang Arif Hakim Dato' Dr Kamalanathan Ratnam dengan kehadiran Pn Palanimmah Mutu bagi pihak plaintif, dan Pn Dehavi Rosalind John bagi pihak defendan ADALAH DIPERINTAHKAN SECARA PENGHAKIMAN PERSETUJUAN bahawa:
>
> (i) pihak defendan dan plaintif kembali pada kedudukan asal sebelum tahun 1992 di hartanah yang dikenali sebagai Geran No 26496 Lot 211, Seksyen 96, Negeri Wilayah Persekutuan (dahulu dikenali sebagai Geran 12688) dan yang beralamat di No 18, Lorong Maarof, Jalan Bangsar, Kuala Lumpur;
>
> (ii) plaintif mengembalikan wang sejumlah RM185,000 bersama dengan faedah sebanyak RM65,000 sebelum 30 Jun 1999 kepada defendan (selepas ini dirujuk sebagai wang tersebut RM250,000);
>
> (iii) jikalau plaintif gagal membayar wang tersebut sebanyak RM250,000 dalam tempoh masa yang ditetapkan, defendan memberi lanjutan masa kepada plaintif selama tiga bulan bermula dari 30 Jun 1999 sehingga 30 September 1999 untuk menunaikan bayaran sebanyak RM250,000 bersama dengan faedah 4% setahun yang dikira pada kadar harian;
>
> (iv) defendan menandatangani Borang Memorandum Geran No 26496 Lot No 211 Seksyen 96 Negeri Wilayah Persekutuan secara escrow dan mendepositkannya dengan peguam defendan yang akan memegangnya sebagai 'Stakeholder' dan akan melepaskan borang memorandum pindah milik yang telah ditandatangani apabila menerima jumlah RM250,000 tersebut bersama dengan faedahnya yang perlu dibayar bagi tempoh lanjutan (jika ada);
>
> (v) plaintif diharuskan menanggung semua kos guaman, perbelanjaan dan setem duti bagi memindah milik hartanah dari defendan kepada plaintif;
>
> (vi) kos yuran guaman peguam defendan sejumlah RM12,000 harus dibayar oleh plaintif sebelum 30 Jun 1999.

A Bertarikh pada 16 haribulan Jun 1999

tt (Illegible)
NORLIZA BT OTHMAN
....
Penolong Kanan Pendaftar
Mahkamah Tinggi
B Kuala Lumpur

PENGHAKIMAN ini telah difailkan oleh Tetuan Atma Singh Veriah & Co, peguamcara bagi pihak defendan yang mempunyai alamat penyampaiannya di Tingkat 3, No 51–53, Leboh Ampang, 50100 Kuala Lumpur.

C Tel.: 03–2383029/03–2383464 Fax.: 03–2309295
Ruj: (d.\MW\c:6453\97) ASV/kas/6453/97)

It would be apparent that by the consent judgment, the second plaintiff was ordered by consent to execute the transfer in the name of the defendant in her personal name and not as a trustee. It was pointed out that the D defendant had paid the second plaintiff the money as ordered and so the property was duly transferred to the defendant in her personal name. It was submitted that on the strength of the consent judgment in Civil Suit No S2–22–263–97, the dispute as to whether the defendant was a trustee for all the brothers and sisters would have come to an end. On the effect of a consent order, reference to the case of *Kinch v Walcott & Ors* [1929] AC 482 should E be made. There, the headnote carried the following write ups (see p 482 of the report):

> An order by consent is binding unless and until it has been set aside in proceedings constituted for that purpose.
>
> A plaintiff in an action based upon charges which he has withdrawn by F consent order in a previous action between the parties is estopped by the order and cannot effectively plead in reply that his consent was induced by fraudulent concealment.

The headnote to the case of *Lee Sock Goh v Straits Cabaret (1953) Ltd* [1965] 2 MLJ 3 merits reproduction and there it states that:

> G (1) The final judgment of a court of competent jurisdiction is conclusive between the parties on any question put in issue and decided by it and this principle applies in the case of a judgment by consent and notwithstanding that there has not been a full hearing on the facts.

The Supreme Court in the case of *Asia Commercial Finance (M) Bhd v H Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, speaking through Peh Swee Chin FCJ had this to say on the doctrine of res judicata (see p 200 of the report):

> It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.
>
> I There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of

> thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata ie doctrine of estoppel *per rem judicatum.*
>
> We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel *per rem judicatum.* It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

However, it must be recalled that the first plaintiff was not named as a party in Civil Suit No S2–22–263–97 and so it may be argued that the first plaintiff should not be barred from claiming that the said property should be held by the defendant in trust for all the brothers and sisters. But this argument must be read together with and in the context of para 17 of the statement of claim which was worded in this way:

> Defendan pada masa guaman pertama terhadap plaintif kedua berterusan defendan oleh dirinya sendiri, pekerjanya dan/atau agennya iaitu peguamnya di guaman pertama Planimmah Mutu telah memperolehi satu surat akuan statutori dan, plaintif pertama bahawa plaintif pertama tidak mempunyai apa jua kepentingan di harta tersebut dengan sesuatu salah nyataan yang dibuat oleh Palanimmah Mutu sebagai peguamcara defendan bahawa surat akuan statutori adalah hanya untuk menolong defendan memenangi guamannya terhadap plaintif kedua. Tiada sebarang salinan surat akuan statutori diberi kepada plaintif pertama.

and, concisely put, the first plaintiff was saying that in order to assist the defendant to win her previous action against the second plaintiff — referring to Civil Suit No S2–22–263–97, the first plaintiff had to swear a statutory declaration stating that she had no beneficial interest in the said property. It was submitted on behalf of the defendant that the plaintiffs' statement of claim in the present action indicated that the first plaintiff was aware of the previous action in Civil Suit No S2–22–263–97 because the number of the previous action was alluded to in para 16 of the statement of claim in the present action. It was also submitted on behalf of the defendant that the first plaintiff also knew the substance and nature of the second plaintiff's counterclaim against the defendant in the former action and that such knowledge can be inferred from the contents of the statutory declaration made by the first plaintiff. It was further argued that by coming forward to assist the defendant in the previous action between the defendant and the second plaintiff and by volunteering evidence in the form of a statutory declaration averring to the facts in the previous action, the first plaintiff was privy to the previous action. It was pointed out that in the previous action the second plaintiff counterclaimed that the first plaintiff was one of those who had a beneficial interest in the said property, and the first plaintiff then swore a statutory declaration to state that the first plaintiff had no beneficial interest. It is interesting to note that a copy of the statutory declaration sworn by the first plaintiff was annexed as an exhibit marked as 'NN17' in encl 8 and that statutory declaration was worded in this way:

> STATUTORY DECLARATION
>
> I, PATHMA A/P NAGANATHER (NRIC NO 1487555) of No 18, Lorong Maarof, Off Jalan Bangsar, 59000 Kuala Lumpur do hereby declare and solemnly state as follows:
>
> 1 that my mother had owned an undivided share in the property known as Geran No 26496 Lot 211 Seksyen 96, Wilayah Persekutuan (Old Grant No RN12688) known as No 18, Lorong Maarof, Jalan Bangsar, Kuala Lumpur ('the said property');
>
> 2 that she had during her lifetime always intended that her entire share be transferred and/or given to my sister, Nivedita a/p Naganather (NRIC No 351019–10–5246).
>
> I have no intention of claiming any interest on the said property as it should rightfully belong to Nivedita a/p Naganather as per my late mother's intention. In fact, she had paid for the said shares through her compensation money and the Government loan.
>
> And I make this solemn declaration believing the same to be true and by virtue of the provisions of the Statutory Declaration Act 1960.
>
> AFFIRMED by the abovesaid)
> PATHMA A/P NAGANATHER) Sgd (N Pathma)
> at Kuala Lumpur on the 12th day)
> of August 1998)
>
> Before me,
> Sgd (Illegible)
> COMMISSIONER FOR OATHS

The defendant also relied on other statutory declarations made by the other siblings and these statutory declarations can also be found in exh 'NN17' of encl 8, and I do not propose to reproduce them. In essence, these other statutory declarations of the other siblings merely echoed the same sentiments, namely, that they have no interests in the said property.

It was argued on behalf of the plaintiffs to the effect that the statutory declarations of the other siblings, as well as that of the first plaintiff, were made during the pendency of Civil Suit No S2–22–263–97 between the defendant and the second plaintiff, and in particular, the statutory declaration made by the first plaintiff was made upon a misrepresentation by the defendant's solicitors in that suit which misrepresentation was made in the presence of the defendant and one Siva Ananda Devi to the effect that the statutory declaration of the first plaintiff was only to be used to assist the defendant in that suit. Incidentally, all these averments can be seen in paras 28, 29 and 30 of encl 10. It was pointed out by the learned counsel for the plaintiffs that the defendant had not in her affidavit in encl 12 denied that the misrepresentation was made by the defendant's solicitors in that suit — referring to Civil Suit No S2–22–263–97 — in her presence as well as in the presence of Siva Ananda Devi who had also signed her own statutory declaration on the same misrepresentation. It was submitted that the contents of the statutory declarations of the other siblings, as well as the statutory declaration of the first plaintiff were in identical terms and along these lines:

(i) that the property was intended as a gift and not as a purchase as alleged by the defendant;

(ii) that the money was paid for the purchase of shares in the said property and this was said to contradict the defendant's story that the compensation money was paid towards the construction of the house in relation to the property; and

(iii) the defendant did not pay anything to Kandasamy for the transfer of the half share.

And all these were said to be serious issues that required investigations at the full hearing.

Incidentally, it would also be germane to note that the defendant's third affidavit as seen in encl 14 categorically stated that the compensation sum was used to pay the contractor for the balance of the contract sum as well as to repay family friends.

The defendant heavily relied upon the statutory declarations of two family friends, namely, Sivapakiam a/p Sellapah and Seenivasagam a/l Veerakathy and their statutory declarations can be seen in exh 'NN18' of encl 8. But the plaintiffs challenged the contents of the statutory declarations in exh 'NN18' of encl 8 by categorically stating that although they were family friends, yet they had no personal knowledge of the matters alleged therein. The plaintiffs pointed out that Sivapakiam a/p Sellapah is 78 years of age and that she was 76 years of age when the statutory declaration was made. On the other hand, it was emphasized that Seenivasagam a/l Veerakathy is 92 years of age and he was 90 years old at the time the statutory declaration was made. Now, at this juncture, it would be germane to refer to the plaintiffs' second affidavit as seen in encl 10 particularly paras 31(c), (d), (e), (f), (g), and (h) thereto simply because these paragraphs would, when taken in its correct perspective, add a different complexion to the statutory declarations of both Sivapakiam a/p Sellapah and Seenivasagam a/l Veerakathy. I will now reproduce these paragraphs:

> (c) It is obvious from a reading of the statutory declaration that the statement therein are the statements of the defendant, made with the intention to support her claim against the second plaintiff in the first suit.
>
> (d) The statement in para 4 of the statutory declaration made by Seenivasagam a/l Veerakathy that the late Manickam had always made known of her desire during her life time that upon her demise, the

> daughter, Nivedita a/p Naganather is to have the property, clearly confirms that the transfer of the property into the defendant's name from Kandasamy in 1962 (half share) and the other half share from the mother for the sum of RM90,000 in 1983 was as trustee. There was no reason for the mother to express her desire prior to her death that the property should go to the defendant upon her death as the property was already transferred and registered in the name of the defendant for alleged valuable consideration in 1983.
>
> (e) Paragraph 5 of the statutory declaration is vague and contradicts the statement of the defendant that she paid the alleged said sum of RM10,000 towards the costs of construction whereas Seenivasagam a/l Veerakathy also states (that) the money was used to settle all the liability.
>
> (f) With reference to the statement in para 3 of the statutory declaration made by Sivapakiam a/p Sellapah, the same fails to disclose:
>
> (i) the amount of compensation received by the defendant.
> (ii) the person to whom the amount was paid.
> (iii) the purpose for which it was utilized.
>
> (g) Since the said Sivapakiam a/p Sellapah is alleged to be privy to the alleged events related in her statutory declaration, surely she would have disclosed the matters set out above. The contents of the statutory declaration is not true.
>
> (h) I state that the statutory declaration 'NN–18' and 'NN–17' were made with the first suit in mind. The defendant had not disclosed the statutory declarations NN–17 and NN–18 in the 'ikatan dokumen' in the first suit. Now shown to me is an index of the ikatan dokumen.

and these paragraphs were said to have raised serious issues which have to be investigated.

It was argued on behalf of the defendant to the effect that although the first plaintiff was not a party to Civil Suit No S2–22–263–97, yet the first plaintiff was aware of that action and had an interest in it but sought to remain neutral and inactive. The inaction of the first plaintiff was said to be fatal. Stuart-Smith LJ in *House of Spring Gardens Ltd & Ors v Waite & Ors* [1990] 2 All ER 990, in a separate judgment, had this to say for the Court of Appeal in regard to the inaction of a party who failed to intervene in a particular proceeding notwithstanding the fact that the party has an interest in the proceeding. At pp 998–999 of the report, his Lordship Stuart-Smith LJ succinctly said:

> Mr Macleod was not a party to the action; but an estoppel will bind those who are privy to the parties bound: see *Carl–Zeiss–Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536, [1967] 1 AC 853.
>
> The requisite privity is said to be a privity of either blood, of title or of interest: see *Carl–Zeiss* [1966] 2 All ER 536 at p 550, [1967] 1 AC 853 at p 910 per Lord Reid. The only relevant one is privity of interest. It is not easy to detect from the authorities what amounts to a sufficient interest. It has been held that judgment against a defendant in one capacity does not bind him in

> another capacity: see *Marginson v Blackburn BC* [1939] 1 All ER 273, [1939] 2 KB 426, though I would wish to reserve my opinion as to whether on the facts of that case, the plaintiff's representative claim might not have been struck out as an abuse of the process. A mere interest in the outcome of the litigation is not sufficient. A
>
> In *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54 at p 60, [1977] 1 WLR 510 at pp 515–516, Megarry VC propounded this test: B
>
>> '... but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is, in that sense, that I would regard the phrase 'privity of interest' ... A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him. Even if one leaves on one side collusive proceedings and friendly defendants, it would be wrong to enable a plaintiff to select the frailest of a number of possible defendants, and then to use the victory against him not merely *in terrorem* of other and more stalwart possible defendants, but as a decisive weapon against them.' C D
>
> There is a further principle which in my judgment supplements what was said in that case by Megarry VC. It is to be found in the judgment of the Privy Council in *Nana Ofori Atta II v Nana Abu Bonsra II* [1957] 3 All ER 559 at pp 561–562, [1958] AC 95 at p 102, where Lord Denning said: E
>
>> 'Those instances do not, however, cover this case which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question, the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley v Andrews* (1871) LR 2 P&D 327 at p 328. The full passage is in these words: '... there is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case.' F G

Further down on the same page, his Lordship Stuart-Smith LJ continued in serious vein: H

> Mr Macleod was well aware of those proceedings. He could have applied to be joined in them, and no one could have opposed his application. He chose not to do so and he has vouchsafed no explanation as to why he did not. Counsel for Mr Macleod says he was not obliged to do so; he was not obliged to go to a foreign jurisdiction; he could wait until he was sued here. He speaks as if Mr Macleod was required to go half way round the world to some primitive system of justice. That is not so. He had to go to Dublin whose courts, as the judge said, are perfectly competent to deal with this matter. I

A

> Moreover, it was a process that was good enough for the Waites. Instead, he was content to sit back and leave others to fight his battle, at no expense to himself. In my judgment, that is sufficient to make him privy to the estoppel; it is just to hold that he is bound to the decision of Egan J.

Finally, his Lordship Stuart-Smith LJ rounded up the matter when he said at p 1000 of the report:

B

> The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court, it having been tried and determined by Egan J in Ireland. In my judgment, it would not; indeed, I think it would be a travesty of justice. Not only would the plaintiffs be required to relitigate matters which have twice been extensively C investigated and decided in their favour in the natural forum, but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves. The Waites have not appealed Sir Peter Pain's judgment, and they were quite right not to do so. The plaintiffs will no doubt proceed to execute their judgment against them. What could be a greater source of injustice, if in D years to come, when the issue is finally decided a different decision is reached in Mr Macleod's case? Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause.

Another case in point would be that of *In re Lart*; *Wilkinson v Blades* [1896] 2 Ch 788, where the headnote states as follows:

E

> A person not a party to an action or summons, nor technically bound by the judgment, but fully cognizant of the proceedings, who stands by and deliberately takes the benefit of a decision on the construction of a will under which a particular fund is distributed, is estopped by his conduct, where the circumstances are identical, from re-opening any of the questions covered by F the former judgment by means of a fresh action or summons relating to another fund under the same will, though claiming in respect of a different interest.

and Chitty J, who delivered the decision in that case, aptly said about the conduct of the parties in that case in this way (see p 792 of the report):

G

> Now, Mrs Wilkinson was not a party to the action, nor was her husband; but they were both aware of the suit and of its nature, and they were aware of the order when made, and Mr Wilkinson, one of whose letters is before me, knew that some of the persons who claimed that there was an intestacy were disappointed with the decision, and that there was a question of appealing. Mr H Wilkinson acted for his wife, as he says in his affidavit, she leaving the matter entirely to him, and Mr Wilkinson by the letter, took a decided part in regard to the question of appeal, and dissuaded others who were parties to the action from appealing. He knew the nature of the case; he knew that it had been represented, at any rate by a solicitor, that some of the counsel considered that an appeal would succeed, and yet he took the part against an appeal that I have already stated. Then comes, in these circumstances, the division of that I particular fund, and Mr and Mrs Wilkinson received the sum of 2000 pounds. or thereabouts of Mrs Wilkinson's share, as one of the surviving children of the testator, in Mrs Stanton's fund.

> Consequently he was cognizant of the proceedings before judgment; he was cognizant of the judgment itself, and with full knowledge of the circumstances, he deliberately took the benefit of the order. Now, the question which he proposes to raise by the present summons is exactly similar.

At p 794 of the report of the same case, Chitty J remarked:

> Now, it is plain that Mr Wilkinson has done this: he has, in the language of Lord Penzance in *Wytcherley v Andrews* LR2 P & M 329, 'knowing what was passing,' been 'content to stand by and see his battle fought by somebody else in the same interest'; because the point that Mr Wilkinson now desires to raise was raised on the occasion of the former decision. In the Probate Division, as is shown by *Young v Holloway* (1895) P 87 and other earlier authorities, a party, where a will is in question, has a right to intervene, and if he does not intervene, he is prima facie bound by the result of the litigation; and the reasoning upon which that practice has been established is that which is disclosed by the passage from which I cited an extract. He has power to intervene; he remains a spectator and he lets others fight his battles.

And his Lordship Chitty J continued to say, in serious vein, at p 795 of the report of the same case:

> Mr Wilkinson has taken advantage of the former trial; and though Mr Ingle Joyce is quite right, that this is not the same fund, and that according to the strictness of common law principles in reference to judgments the analogy would not be perfect, yet it appears to me that dealing with this, which is an equitable law, that analogy does afford some reasonable ground for saying that Mr Wilkinson in the circumstances is bound. Now, I have not said he is bound by the judgment – I think he was not; but by his conduct after the judgment and under the judgment: knowing all the circumstances and deliberately taking the benefit of it, knowing that in a certain event that judgment might prove adverse to his material interests, he stood by, and by taking the money has acquiesced if ever a man could acquiesce.

Using these authorities as leverages, the learned counsel for the defendant strenuously argued that the second plaintiff being a party to Civil Suit No S2–22–263–97 was certainly barred by res judicata. It was also argued that the first plaintiff was privy to that suit but sought not to intervene and the first plaintiff too was said to be barred by res judicata.

But by way of a rebuttal, the learned counsel for the plaintiffs argued that the issues raised in Civil Suit No S2–22–263–97 were never adjudicated on its merits and, consequently, it was vigorously submitted that the doctrine of res judicata could not apply to the consent judgment that was entered in that action. The case of *Wong Sai Tack v Chien Hon Keong* [2000] 5 MLJ 74 was cited in support of that proposition. In that case, I had this to say at p 77 of the report:

> Tun Salleh Abas, with vigour and vitality, summarized the law on res judicata in this way. It was his submission that there must be three pre-requisites before the doctrine of res judicata can come into play:
>
> (1) there must be identity of parties;

(2) the issue must be the same; and

(3) the same issue was already finally determined with precision.

I then proceeded to examine the law, and I had this to say at pp 81–82 of the report:

> In my judgment, the doctrine of res judicata is not a technical doctrine. It is a simple doctrine which ensures that there must be an end to litigation (*Webster v Armstrong* (1885) 54 LJ QB 236; *MacDougall v Knight* (1890) 25 QBD 1, CA; and *Green v Weatherill* [1929] 2 Ch 213). Here, the defendant raised the doctrine of res judicata by way of an estoppel to the present action. The defendant was in fact saying that the whole legal rights and obligations of the parties have been concluded in the first action by the SAR. I am entitled to look at the decision of the SAR as well as to the notes of evidence (exh 'CHK 7' of encl 7) to arrive at a just decision as to whether the doctrine of res judicata can be invoked in favour of the defendant (*Randolph v Tuck* [1962] 1 QB 175, [1961] 1 All ER 814; *Marginson v Blackburn Borough Council* [1939] 2 KB 426 and *Sterling Engineering Co Ltd v Patchett* [1955] AC 534, [1955] 1 All ER 369). The case of *Re Bullen (No 2)* (1972) 29 DLR ((3d) 257 (BC)) allows this court to have regard to the reasons for the judgment of the SAR in order to determine the question of law decided in the first action and having done so, it was my judgment that the decision of the SAR in the first action was not conclusive and was not binding in regard to the present action. In short, the cause of action had not been determined on the merits (*Badar Bee v Habib Merican Noording* [1909] AC 615; *Livesey v Harding* (1855) 21 Beav 227; *AG v Rochester Corpn* (1833) 6 Sim 273 and *Glasgow and South-Western Railway Co v Boyd and Forrest* (1918) SC 14).
>
> In the local scene, Chang Min Tat FJ had this to say of the doctrine in the case of *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24:
>
> > 'At the hearing of the appeal, it was put to counsel for the appellants that to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 'necessarily and with precision' determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed.'

Proceeding further, it was argued on behalf of the plaintiffs that from the tenor of the consent judgment in Civil Suit No S2–22–263–97 as reproduced earlier (exh 'NN19' of encl 8 which is also the same as exh 'P11' of encl 4), it showed that the second plaintiff retained his rights to the said property and at the same time, to have the issue of the trust adjudicated upon based on the first part of the consent judgment which stated that the parties were reverting to their original positions prior to 1992. It was emphasized that the year 1992 was crucial as that was the year when discussions were held wherein the second plaintiff would purchase the property and the property would remain trust property.

Thus far, I have endeavoured to show that the parties were at wits end to show to this court the strengths of their case and the weaknesses of their opponent.

The learned counsel for both sides were quite meticulous. Every small detail was raised and ventilated. Treading cautiously, it was submitted on behalf of the defendant that the first plaintiff challenged her own statutory declaration that was made in relation to Civil Suit No S2–22–263–97. In para 17 of the statement of claim, the first plaintiff claimed that her statutory declaration was executed for a different motive. What the first plaintiff was implying was that although she swore the statutory declaration, yet the contents and substance of that statutory declaration were said to be false. In short, the first plaintiff was challenging the truthfulness of her own statutory declaration. Again, in the fifth prayer of her statement of claim, the first plaintiff sought for a declaration that her statutory declaration that was made by her be declared void and cancelled. It was submitted that a claim for rescission of an instrument just like a claim for an injunction was in the nature of an equitable remedy. These remedies would only be allowed if the parties come to court with clean hands. *Pollock & Mulla on Indian Contract and Specific Relief Acts* (10th Ed) by Jeevan Lal Kapur carried very interesting passages on equitable remedies, and at pp 1050–1051, the learned author said:

> Parties equally guilty — Where a well placed man brought a suit for the rescission of a sale he got effected in favour of his mistress (for five years) on the ground of its being immoral and for future cohabitation and therefore void, being against public policy, the court in the exercise of its discretion under s 31 Specific Relief Act refused to grant the relief on the ground of the parties being equally guilty, applying the principles of *in pari delicto* and *particeps criminis*. The court laid down the following principles which are applicable to such actions.
>
> A plaintiff is denied assistance where he would derive benefits from his own immorality or fraud or illegality on the maxim that he who seeks equity must do equity or he who seeks equity must come with clean hands.
>
> The court also laid down the following principles which have to be applied:
>
> i) the court will not assist a party to an illegal transaction.
>
> ii) the court will not intervene to rescind a transaction done for an immoral purpose and after the object is achieved.
>
> iii) where the court finds both the parties equally guilty, the court will stay its hand and let the mischief lie where it lies.
>
> iv) A party seeking an equitable relief must come with clean hands (*Kamorbai v Badrinarayan* (1977) AB 228, at p 235).

These passages must be read with s 3 of the Statutory Declarations Act 1960 which enacts that:

> Declarations made by virtue of the provisions of this Act shall be deemed to be such declarations as are referred to in sections 199 and 200 of the Penal Code.

I must now reproduce ss 199 and 200 of the Penal Code:

> 199 Whoever, in any declaration made or subscribed by him, which declaration any court, or any public servant or other person, is bound or

> authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.
>
> 200 Whoever corruptly uses or attempts to use as true any such declaration knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.
>
> *Explanation* — A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

And the punishment for making false evidence is found in s 193 of the Penal Code which states that:

> Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to a fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to a fine. … …

These provisions of the Penal Code are certainly thought provoking. It was submitted that the first plaintiff had come to court and had said that she had committed a criminal offence by swearing the statutory declaration in relation to Civil Suit No S2–22–263–97 with a different motive and such conduct would certainly not entitled her to be regarded as a person coming to court with clean hands. It was submitted that the first plaintiff had confessed to perjury. It was pointed out that the first plaintiff had, in her affidavit that was affirmed on 17 March 2000 before a commissioner for oaths by the name of Ralph Kinney Fernandez, deposed at para 28(d) of that affidavit as seen in encl 10 the following:

> I state that the contents of the statutory declaration are false.

Using these submissions as springboards, it was urged upon me to hold that the plaintiffs' claims were barred by res judicata and that this court had no jurisdiction to hear the plaintiffs' claims and that the writ of summons and the statement of claim were claims that were frivolous and vexatious and an abuse of the process of the court. It was also urged upon me to hold that the first plaintiff had not come with clean hands and, consequently, was disqualified from claiming equitable relief by way of an injunction. Having come to court with unclean hands, it was submitted that the first plaintiff was not even competent to claim rescission of the statutory declaration that was sworn by her in relation to Civil Suit No S2–22–263–97. For all these reasons, it was submitted on behalf of the defendant that the plaintiffs' ex parte injunction must be set aside with costs and an inquiry as to damages must be ordered. Likewise, it was also submitted that the application that was made inter partes for an interim injunction must also be dismissed with costs. It is said that a statutory declaration is a sworn statement of facts and it ranks as evidence and it is not an instrument that can be cancelled midway. All these germane submissions were noted by me in adjudicating encl 11. A

My attention was drawn to the defendant's affidavit that was affirmed on 4 April 2000 as seen at encl 14 of para 15 where the defendant estimated that she had lost RM600,000 because of the injunction that was wrongly obtained by the plaintiffs. B

Factually speaking, the plaintiffs disputed that the defendant had purchased the one half share of the undivided share from Kandasamy for valuable consideration in 1962. The defendant relied on the memorandum of transfer to show that she had paid a sum of RM12,000 to Kandasamy (see exhibit marked as 'NN30' of encl 36), and she too relied upon the statement in the memorandum of transfer to show that Kandasamy had received the said payment. But this alleged payment of consideration to Kandasamy was debunked by the defendant herself. In para 2(a) of the defendant's statement of defence that was filed on 24 April 2000, the defendant averred that: C D

> In consideration of RM10,000 paid towards a substantial part of the construction cost of the house on the said property in 1960 or thereabouts, one half undivided share in the land was transferred and duly registered absolutely in favour of the defendant on 30 May 1962.

E

On top of that, the defendant had in para 3(a) of her reply to defence and defence to counterclaim in Civil Suit No S2–22–263–97 (see exhibit marked as 'P14' in encl 13) categorically stated that Kandasamy's undivided half share was transferred to her by Kandasamy at the request of the mother. Thus, based on the defendant's own averment, the consideration that was stated in the memorandum of transfer was not paid to Kandasamy. It was the plaintiffs' stand to show that the alleged admission of receipt of the sum of RM12,000 as consideration was not received by Kandasamy and the plaintiffs were entitled to mount that challenge. This approach was approved by the Federal Court (Lee Hun Hoe CJ (Borneo), Seah and Syed Agil Barakbah FJJ) in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290, where the headnote at p 291 carried the following caption: F G

> Held: (1) although the agreement of sale contained an acknowledgment of the receipt of the deposit of $10,000, it was open to the vendor to prove that no consideration had actually been paid. In this case, the appellant had proved that the sum of $10,000 was not in fact received by her and therefore the total sum paid by the respondent was $26,000. H

and Seah FJ, delivering the judgment of the Federal Court, said at p 293 of the report:

> Although cl 3 of exh P1 appears to contain an acknowledgment by the plaintiff of the receipt of the sum of $10,000 from the defendant at the time of the signing of the contract, it was submitted by learned counsel that the plaintiff was not estopped by ss 91 and 92 to adduce evidence that the $10,000 was in I

> fact not paid or received by her. Authority for such a proposition may be found in the Privy Council case of *Sah Lal Chand v Indarjit* 1899–1900 27 IA 93 where it was held that (i) s 91 of the Indian Evidence Act (which is in the same terms with s 92 of our Evidence Act 1950) does not preclude oral evidence to contradict a recital of fact in a written contract and (ii) it is settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds. In our judgment, the learned judicial commissioner was therefore wrong in law to shut out the oral testimony of the plaintiff that she did not in fact receive the $10,000 from the defendant at the time of the signing of exh P1 or at any time thereafter. Since the plaintiff had expressly denied receiving the $10,000 from the defendant and in the absence of any evidence that PW2 paid over the $10,000 to the plaintiff, the finding of the learned judicial commissioner by way of inference, that the plaintiff had received the deposit of $10,000 could not be supported. Based on the finding of the court, the $10,000 was and appears to be still being retained by PW2.

And, of course, that challenge whether it can or cannot be successfully mounted can only be determined at the trial proper.

Next, it was argued on behalf of the plaintiffs, that para 13(b) of encl 10 averred that the beneficial interest of the brothers and sisters in the undivided half share in 1979 was transferred to the mother in trust purely to enable her to administer the estate conveniently because at that time the second plaintiff was in Grik, Perak, Somasundram was in Malacca, Ishwari in Johor Bahru and Siva Ananda Devi in India. Surprisingly, this averment was not denied by the defendant and it must be deemed to be admitted. In *Punca Klasik Sdn Bhd v Foh Chong & Sons Sdn Bhd & Ors* [1996] MLJU 471, [1998] 1 CLJ 601, I had occasion to say at p 610 of the report the following:

> It was asserted categorically and deposed in encl 40 that the administration of the estate of Syed Hassan bin Ahmad Alattas was incomplete and the residuary not ascertained. This was not denied by the defendants in the affidavit in reply of Siow Kwong Shang @ Siow Kwang Joon in encl 41. A non denial of this nature particularly in a trial by affidavit must necessarily be deemed as an admission. Gopal Sri Ram JCA eruditely said in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 especially at p 286 to this effect:
>
> > 'Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is normally treated as an admission by him of the fact so asserted: *Alloy Automobile Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [19881 3 MLJ 332.'

and it must surely apply to the facts at hand.

It was pointed out that the late mother's purchase of Kandasamy's beneficial interest in the half share from the official assignee when Kandasamy became a bankrupt was from monies obtained from the common fund. It seemed that the plaintiffs also disputed that the defendant had purchased the undivided half share in 1983 from her late mother for valuable consideration. Now, the defendant's letter dated 10 May 1983 as seen in exh 'NN10' of encl 8 added a different complexion to the whole case. At para 4 of the defendant's letter in exh 'NN10' of encl 8, the defendant had this to say:

> Hak milik ibu saya pada rumah keluarga tak mungkin mudah dijual kerana:
>
> (a) adalah menyusahkan bagi seseorang yang membeli harta yang begini keadaannya;
>
> (b) ibu serta kesemua anak–anak ingin menjadikan rumah dan tanah in sebagai satu unit lengkap kepunyaan saya.

and, it was argued on behalf of the plaintiffs that if the children did not have any beneficial interest in the said property why was there a need to make reference to the property as 'rumah keluarga' and why was there a reference to the desired result of all the children. At para 9 of the same letter, as seen in exhibit 'NN10' of encl 8, the defendant conveyed the following message:

> Mungkin harapan seorang ibu, beliau ingin memperuntukkan dan membahagi-bahagikan segala harta kepada semua anak-anaknya sebelum beliau meninggal dunia. Di atas kata-kata di ataslah maka ibu telah mendesak saya membeli bahagian rumah dan tanah atas namanya itu dengan seberapa segera yang boleh.

which when translated into the English language showed that there was a clear admission by the defendant herself that their mother wanted to divide to all the children before she died and the only property that she held in 1983 was the half share in that property and according to the deed of renunciation, the other assets of the estate have been distributed since each of the siblings had stated that they had received their share of the rest of the estate. As against this, there was an averment by the defendant in para 16 of encl 14 that the balance of the costs of construction was paid from the realization of the balance of the estate amounting to RM11,000. So it can be surmised that from the defendant's own admission that there were no other assets available for distribution from the late father's estate and neither had the late mother any other property save and except for the undivided half share in that property that was registered in her name.

I cannot help but observe that there was a point by point rebuttal by both sides in the affidavits as alluded to earlier. For instance, while the defendant denied that the property was a trust property the plaintiffs, on the other hand, argued that the property was, at all times, trust property.

I must proceed further.

In encl 10, in exh 'P13' and in encl 42 of exh P15, P16, P17 and PIS the averments showed that the first plaintiff had taken loans for the renovation of the house in the said property in 1974 and had contributed her salary towards the common fund which was used to pay for the construction of the house and for the upkeep of the family and the said property. It was next argued that in Civil Suit No S2–22–263–97, the defendant had claimed for injunctive and declaratory orders including an order that the second plaintiff re-transferred the said property to the defendant without offering to refund the sum of RM185,000 which the defendant had collected from the second plaintiff as 'stakeholder' but instead had utilized the money to pay for the following:

(a) to redeem the outstanding government loan amounting to approximately RM50,000;

(b) to redeem her jewellery from the pawn shop; and

(c) to pay off loans she had taken from others.

Whereas the consent judgment to Civil Suit No S2–22–263–97 provided, inter alia, that the defendant had to pay the second plaintiff the sum of RM185,000 together with interest totalling RM65,000 and costs of RM12,000. It was reiterated by the plaintiffs that the property remained, at all material times, a trust property although the property was duly re-transferred and registered in the name of the defendant.

In regard to the defendant's allegation that the first plaintiff with another sister by the name of Siva Ananda had occupied the property as licensees, the plaintiffs argued that they were occupying the property as beneficial owners since the house was constructed in 1960. In regard to the defendant's allegation that the second plaintiff had occupied one of the rooms as a licensee and not as a beneficial owner and when his daughter came from Perth, Australia, she moved in with the second plaintiff, it was averred that the same daughter had moved out because she was being subjected to all forms of harassment which affected her medical studies. These kinds of counter rebuttals are quite familiar in the present case. It seems to go on ad infinitum.

It was argued on behalf of the defendant that in both the statement of claim and the affidavits in support, the plaintiffs have failed to disclose the existence of the 'will' dated 27 May 1983 made by the late mother in favour of the defendant. That 'will' can be seen in the first affidavit of the defendant as reflected in encl 8 of an exhibit marked as 'NN14' and that 'will' was worded in this way:

> WILL
>
> I, MANICKAM NAGANATHER holder of (Blue) IC No 7780785, of No 18, Lorong Maarof (Off Jalan Bangsar) Kuala Lumpur domiciled in Malaysia, hereby revoke all former wills and testamentary dispositions made by me, and by this my last will made this 27 May 1983, devise and bequeath all my real and personal estate whatsoever and wheresoever to my second daughter Ms NIVEDITA D/O NAGANATHER holder of (Blue) IC No 1487556 absolutely and I appoint the Official Administrator, Malaysia, sole executor of this my will.
>
> In witness whereof I have hereunto set my hand on the date abovewritten.)

Signed by the said testatrix in the presence of us. Present at the same time, who at her request, in her presence, and in the presence of each other, have subscribed our names as witnesses:	Sgd Manickam Signature

Sgd (Illegible).
Witness

Name: N SOMASUNDRAM
Address: c/o Hospital Besar, Melaka
Occupation: Dispenser

Sgd (Illegible).
Witness

Name: T JEYARAJ
Address: 18, Lorong Maarof, Off Jalan Bangsar, Kuala Lumpur
Occupation: Aircraft Engineer

But by way of a rebuttal, the plaintiffs' second affidavit in encl 10 at para 18(e) alluded to the fact that the first plaintiff knew of the existence of the 'will' in 1997 even before applying for the ex parte injunction.

It was pointed out that the first plaintiff had failed to disclose her older brother in law's age as well as the defendant's age when the first plaintiff complained in para 33 of the affidavit in support in encl 4 that she would be 'dicederakan secara fizikal dan akan mengalami kerugian yang teruk dan tidak terkira'.

It was also pointed out that the first plaintiff had failed to disclose to the court that she was asked to vacate the house because she refused to follow the defendant when the defendant moved to her new residence after selling the property. It was argued that the failure on the part of the first plaintiff to disclose such information was quite unfair as it gave the court the impression that the defendant was being unreasonable in asking the first plaintiff to vacate the property within seven days. Incidentally, the offer by the defendant to the first plaintiff was relayed through the defendant's solicitors by a letter dated 6 March 2000 to the first plaintiffs previous solicitors and that letter can be seen in exh 'NN27' of encl 14 and it was worded in this way:

KANESALINGAM & CO
Advocates & Solicitors
and Notary Public
Peguambela dan Peguamcara
dan Notari Awam

Our Ref: 8743/N/2000
6 March 2000 Fax: 78770046
M/S RAMACHANDRAN &
REDDY
ADVOCATES & SOLICITORS WITHOUT PREJUDICE
SUITE 3A–39, BLOCK A2
PUSAT DAGANG SETIAJAYA
NO 9 JALAN PJS 8/9
46150 PETALING JAYA

Dear Sirs

Re: Premises No 18 Lorong Maarof, Bangsar Park, Kuala Lumpur

We refer to the telephone conversation between your Mr Reddy and the writer on 3 March 2000 requesting an extention of time until 31 March 2000 for your client Ms Pathma Naganather to vacate premises No 18 Lorong Maarof, Kuala Lumpur.

We also refer to the telephone conversation this afternoon.

Our client is agreeable to an extention of time up to 14 March 2000 only.

We are instructed that your client was informed five months ago that she would have to vacate at short notice.

Entirely without prejudice, our client would be prepared to offer your client and our client's other sister Ms Siva Ananda Devi licence to occupy a room in the house that our client moves to shortly. In order to take advantage of this proposal, your client together with Ms Siva Ananda Devi must execute the attached letter of undertaking before your Mr Reddy and return it to us by Wednesday 8 March 2000.

Yours faithfully,
Sgd (Illegible).
cc Client
Ak/tsm

It was submitted that although the letter as reproduced above was marked 'without prejudice', the plaintiffs were under a duty when making an ex parte application for an injunction to make full disclosure of all the material facts. As authority for this proposition, the defendant relied on the case of *The 'Giovanna'; Gulf Interstate Oil Corporation LLC and The Coral Oil Co Ltd v Ant Trade & Transport Ltd of Malta* [1999] 1 Lloyd's Rep 867 and to the decision of Rix J, who, at p 872 of the report, aptly said:

> Of course, there had not yet been a concluded agreement with the owners, and all the negotiations between Ince & Co and Clyde & Co were conducted, and the correspondence was all marked, without prejudice. Mr Michael Collins, QC, on behalf of the plaintiffs, therefore submitted that the plaintiffs could not be criticized for making no mention of such negotiations. I do not agree. It may be that the correspondence itself could not have been unilaterally presented to the court by the plaintiffs, but I do not accept that a Mareva injunction can be sought ex parte without at least some mention being made of the existence of an offer of security, an offer which was still current at the time when the plaintiffs went to court. Such an offer, even though there may be strings attached, runs directly contrary to a Mareva applicant's implicit

> invocation of the court's assistance in confronting a real risk of dissipation. It seems to me that the situation is somewhat analogous to one where there is an application to strike out an action for want of prosecution: the fact and even the contents of without prejudice negotiations can be disclosed for the purpose of explaining the passage of time and the conduct of the parties in the context of an allegation of inordinate and inexcusable delay; see *Family Housing Association (Manchester) Ltd v Michael Hyde & Partners* [1993] 1 WLR 354.

What irked the defendant was this. That although the defendant's solicitors had written to the plaintiffs' present solicitors on 6 March 1999 stating that they were in communication with the first plaintiff's previous solicitors (see exh 'P3' of encl 4), yet the plaintiffs' present solicitors failed to enquire as to what had transpired between the defendant's solicitors and the first plaintiff's previous solicitors before the plaintiffs came to court to ask for an ex parte injunction.

It was further submitted on behalf of the defendant that:

(i) the plaintiffs failed to give notice of the ex parte application to the defendant's solicitors who were on record and that no reasons were stated in the affidavit in support as to why such a notice could not be given;

(ii) the plaintiffs failed to disclose any anticipated defence or answer of the defendant to the present action although the plaintiffs had full knowledge of it; and

(iii) the plaintiffs failed to disclose facts which may have led the court not to grant the relief as sought on an ex parte basis.

By way of a rebuttal, the plaintiffs had this to say. That there was every reason as to why no notice of the application for the ex parte injunction was given. There was a need for secrecy. The defendant had given the plaintiffs seven days to vacate the property failing which the defendant was going to resort to extra judicial means to evict the plaintiffs. If notice was given of the ex parte application, the defendant by her servants and/or agents would have evicted the plaintiffs immediately. On the need to maintain secrecy, it would be ideal to refer to *Lim Nyook Yin v Ultratech Sdn Bhd & Anor* [1995] 1 MLJ 498 and *Castle Fitness Consultancy Pte Ltd v Manz* [1990] 1 MLJ 141. It would be pertinent to note that the grounds for the reasons for proceeding ex parte have amply been set out in the plaintiffs' first affidavit in encl 4 at paras 22, 23, 24, 25, 26, 27 and 28 thereto and I do not propose to reproduce them.

In regard to the undertaking as to damages, the defendant alleged that there was no such undertaking but the plaintiffs said that there was and this can readily be verified by referring to para 30 of encl 4 which clearly showed that the plaintiffs had, in fact, given that undertaking. On an undertaking as to damages generally, I had this to say in the case of *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4)* [1998] 7 MLJ 551, especially at p 601 of the report:

> A It is the practice of the courts to require the plaintiff to undertake to abide by any order the court may subsequently make for the payment of damages to the defendant for the loss suffered because of the grant of the injunction. Lord Diplock in the *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 must have envisaged the possibility of a 'wrong' decision being made at the interlocutory stage to be real and not imaginary, and at p 509 his Lordship had B this to say:
>
>> '... when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time ex hypothesis the existence of the right or violation of it, or both, is uncertain and will C remain uncertain until final judgment is given in the action.'
>
> It is obvious that the purpose of the undertaking is to simply vest the court with the necessary jurisdiction to make the appropriate orders to recompensate the loss suffered by the defendant when it is subsequently established that the plaintiff was not entitled to the injunction in the first place. D Unless and until such an undertaking is given, the defendant wrongly enjoined will hardly have any recourse against the plaintiff (*Attorney-General v Albany Hotel Co* [1896] 2 Ch 696 at p 699). An undertaking as to damages is always required before the court grants an interlocutory injunction. Consequently, it is a correct statement of the law to say, on the authority of *American Cyanamid*'s at p 510, that the ability of the plaintiff to honour his undertaking is a pivotal or a material factor in the balance of convenience. But money is E not everything. The courts will not deny the poor plaintiff an interlocutory injunction simply because of his limited financial resources (*Allen v Jambo Holdings Ltd* [1980] 2 All ER 502). Poverty does not bar the right to an injunction if the circumstances warrant it. In the event there may be difficulty in enforcing the plaintiff's undertaking, either because the plaintiff might not be worth 'powder and shot' then the plaintiff is obliged to fulfill his F undertaking (*The Mito* (1987) 2 Lloyd's Rep 197 at p 198). And if the plaintiff is outside the jurisdiction, the court may require him to give an undertaking by way of a security (*Baxter v Claydon* (1952) WN 376). The best form of security would be by way of a bank guarantee (*Castle Fitness v Manz* [1990] 1 MLJ 141). The court too may even be magnanimous and allow an undertaking to be given by a person who is not a party to the action but who G is within jurisdiction (*Ferragamo v Lotus & Delta Ltd* (1950) 67 RPC 175). In practice, the court will not embark on an elaborate investigation as to the financial means of a particular plaintiff. A bare undertaking, like the present case, is sufficient. Here, the plaintiffs went beyond the call of duty when they disclosed that the second plaintiff was worth RM80m. It was on the defendants part, if they doubted this kind of undertaking, to garner evidence to show the financial status of the second plaintiff by way of affidavit evidence. H Nothing of that sort was forthcoming from the defendant.

In my judgment, these observations must surely apply to the present plaintiffs.

I In regard to the application made inter partes

The learned counsel for the defendant submitted on the following salient points:

(i) that the plaintiffs have not shown a serious question to be tried; A

(ii) that there was no proof that the plaintiffs have any legal right to occupy the house wherein the property stood;

(iii) that after the notice to vacate the property had been given, the plaintiffs were considered as trespassers on the property and can be forcibly evicted without seeking the aid of the court if the plaintiffs refused to move out; B

(iv) that even if the plaintiffs have any claim to the property, damages were said to be an adequate remedy;

(v) that the second plaintiff's claim was barred by res judicata; C

(vi) that the first plaintiff who did not merely stand by in Civil Suit No S2–22–263–97 but had actually participated was also barred by res judicata;

(vii) that the first plaintiff who had executed a deed of renunciation in favour of her late mother in the petition for letters of administration proceedings and who had executed a statutory declaration stating that the first plaintiff had no beneficial interest in the property which statutory declaration was meant to be used in Civil Suit No S2–22–263–97, was certainly hard put to prove her claim hinged on a beneficial interest concept; D

(viii) that the plaintiffs have not shown any evidence to establish their legal right to occupy the said property; E

(ix) that the defendant's title to the property is said to be indefeasible on the basis of the Torrens system;

(x) that the registration of the defendant as the sole proprietor of the property was said to be conclusive proof of her legal and beneficial ownerships; F

(xi) that the balance of convenience was against the granting of the injunction;

(xii) that the plaintiffs must show their ability to meet their undertaking to pay damages in the event it was later found out that the injunction on an inter partes basis should not have been given; G

(xiii) that the plaintiffs as mere licensees were not tenants that would be protected by s 7 of the Specific Relief Act 1950 (as amended by Act A811 in 1992); and H

(xiv) that the plaintiffs have not come to court with clean hands.

This was certainly a case where there were plenty of assertions and counter assertions, averments and counter averments, rebuttals and counter rebuttals, allegations and counter allegations, and there seemed to be no end to it. It was just like a long Tamil movie that went on for ages, so to speak. But all the same, all these intrigues were quite interesting. The adrenal glands were actively stimulated. I

The plaintiffs claimed that the following allegations have not been disputed and they were therefore deemed to be admitted. But the defendant challenged these allegations point by point and rebutted the allegations in this manner. I will now itemize them:

(1) In encl 10 at paras 29 and 30, the plaintiffs alleged that the defendant was present when the alleged misrepresentation as to the statutory declaration was allegedly made by the advocate and solicitor Ms Palanimmah Muttu. But in encl 8 at para 33, the defendant denied that the first plaintiff was misrepresented to in any way into signing the statutory declaration and she too denied any knowledge of any such misrepresentation.

(2) In encl 10 of para 9(c), the first plaintiff claimed that the construction of the house was paid for through a 'family common pool'. Now, although encl 14 of para 16 was expressed to be a reply to a different paragraph of the plaintiffs' affidavits, nevertheless the plaintiffs' contention was challenged by the averment that the construction of the house was paid for half by the defendant, and half from the funds of the late father's estate as shown in the list of assets in the grant of the letters of administration as seen in exh 'NN26' of encl 14.

(3) The plaintiffs said that the alleged 'serious discrepancies' in the letter from Messrs Bannon & Bailey as stated in para 10 of encl 10 to be undisputed. But the defendant by encl 12 of para 15 had said that her receipt of the compensation was being 'frivolously disputed' — thus challenging the so called serious discrepancies and labelling them as mere frivolous disputes.

(4) The averment in para 11 of encl 10 to the effect that the speculative opinion of the first plaintiff that the transfer from Kandasamy should have been in 1960 and not in 1962 was said by the plaintiffs to be unchallenged. But in para 12 of encl 12, the defendant has attacked the plaintiffs' affidavit by stating that it contained mere opinions and hearsay evidence. The defendant then proceeded further and referred to exh 'NN2' of encl 8 which showed the offer of compensation in October 1960. Reference was also made by the defendant to exh 'NN5' of encl 8 which showed that the extraction of the grant of the letters of administration was only made on 12 January 1961 whereas by way of exh 'NN34' of encl 37 it showed that the transfer was made in May 1962. The defendant argued that this was an unduly long time for a transfer to be executed between a brother and sister.

It was argued by the defendant that the plaintiffs should be precluded from submitting on this point because the plaintiffs' counsel had objected to the defendant's affidavit which was affirmed on 28 April 2000 as seen in encl 23, which affidavit was disallowed on technical grounds. It was pointed out by the defendant that that affidavit in encl 23 explained the delay in the realization of money to pay for the construction costs.

(5) The plaintiffs relied on para 13(b) of encl 10 which repeated in more detail para 14 of encl 4 which stated that the deeds of renunciation by the children in 1979 were simply to enable the late mother to manage the property in a more convenient manner. But the defendant replied and this can be seen in encl 8 at paras 12 to 15 and in exhs 'NN4'–'NN7', which categorically stated that the beneficial interest of the children in the property by the intestacy of the late father was being renounced. Not only that, the right to the administration of the late father's estate was also renounced.

(6) That the first plaintiff had taken loans from 'AIA' (American Insurance Association) and 'JCS' (Jaffnese Cooperative Society) went unchallenged and the implication was that the sums taken through the loans were paid in order to obtain a beneficial interest in the house also remained unchallenged. But in para 27 of encl 8, the defendant said that all 'outgoings' in respect of the property were paid by her. It was submitted on behalf of the defendant that the irrelevant fact that the loans being taken out was not challenged but the relevant fact that such loans were being utilized towards the house had been challenged.

(7) The plaintiffs claimed that the allegation that Ishwari had transferred her share in the property to the first plaintiff on the late mother's instruction and a document that was prepared by one Paramalingam of the public trustee's office was handed to the defendant was not disputed at all. But by way of a rebuttal, the defendant relied on para 25 of encl 8 and para 22 of encl 14 where the defendant denied that the dealings between Ishwari and the first plaintiff had anything to do with the property and, in addition to that, the defendant also affirmed that contributions to Ishwari's wedding expenses were done by all the working members of the family without any expectation of a reward. By way of para 27 in encl 14, the defendant further denied that she was ever a custodian of family documents. It was submitted on behalf of the defendant that the learned counsel for the plaintiffs had objected to the presence of the defendant's affidavit that was affirmed on 28 April 2000 as seen in encl 23 where paras 6 and 7 clearly denied all these allegations. With the exclusion of encl 23, the defendant submitted that the plaintiffs' counsel could not now raise such a submission.

(8) In paras 23(c) and (d) of encl 10, the averments showed that the second plaintiff had carried out repairs to the house and had painted it. But the defendant referred to exh 'NN19' of encl 8 where the second plaintiff in Civil Suit No S2–22–263–97 had pleaded exactly the same thing. In exh 'P14' of encl 13, in particular para 3(g) of the reply that was filed by the defendant in Civil Suit No S2–22–263–97 clearly showed that such an averment was denied.

(9) In encl 10 of para 26(e), the first plaintiff averred that the furniture belonging to the second plaintiff which was kept in the house was used

A and not just stored. The plaintiffs claimed that this averment was not challenged. But it was said by the defendant that such an averment was made by way of a reply to para 30 of encl 8 where the defendant averred that the furniture was stored in the house and not used. Arising from that, the defendant posed this question: must the defendant deny a denial?

B

The law

The defendant held onto the notions that the ex parte injunction was wrongfully obtained and, consequently, it should be discharged in any C event. The plaintiffs held opposite views and submitted that the ex parte injunction was correctly obtained. Now, at an ex parte stage, the following principles of law should be advanced and ventilated and it would be useful to refer to them:

(1) The duty to the court to make the fullest possible disclosure of all D material facts within the applicant's knowledge when making the ex parte application. An authority for this proposition would be the case of *The King v The General Commissioners For The Purposes Of The Income Tax Acts, For The District Of Kensington, ex parte Princess Edmond De Polignac* (1917) 1 KB 486 where Warrington LJ writing a separate judgment had this to say at p 509 of the report:

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> It is perfectly well settled that a person who makes an ex parte application to the court — that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, F then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.

(2) At an ex parte stage, the duty of the applicant is to disclose any anticipated defence. The following authorities would be worth G reading:

(a) *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc* (*Lavens, third party*) [1988] 3 All ER 178, where the headnote carries the following legend that is worth quoting:

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> An applicant who applies ex parte for a Mareva injunction is under a duty to the court to make the fullest disclosure of all material facts, including any defence he has reason to anticipate may be advanced. If he does not comply with that duty he will normally be deprived of the benefits of the order without consideration of the merits and irrespective of whether the non-disclosure was innocent or deliberate or whether he would have obtained the order if he had made full I disclosure. However, if the injunction is discharged because of material non-disclosure, the court has a discretion to grant a second injunction when all the facts are placed before it and a second

> injunction may well be granted if the non-disclosure was innocent and an injunction could properly have been granted on the disclosed facts. On the other hand, the applicant will be refused a second injunction if he has failed to press on with his action as quickly as possible.

(b) *Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527, where KC Vohrah J (now JCA) had this to say at pp 529–530 of the report:

> Thus, although the sale and purchase agreements and the assignments were exhibited in encl 3, the fact remains that para 2 of the statement of claim and para 5 of the affidavit of the first plaintiff were misleading and did not disclose that the sale and purchase agreements (except for the one entered into by the seventh plaintiff) were entered into with a firm, not the defendant company. It has been stated that all the facts must be laid before the court and nothing suppressed (see *R v Kensington Income Tax Commissioners* [1917] 1 KB 486), otherwise the order of injunction may be set aside without regard to the merits (see *Boyce v Gill*(1891) 64 LT 824) . In any event, in this case it is necessary to bear in mind what was stated by Bingham J in *Siporex Trade SA Comdel Commodities Ltd* [1986] 136 New LJ 538; [1986] 2 Lloyd's Rep 428 at p 539, discharging a Mareva injunction, inter alia, for failure to make full and fair disclosure:
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>> '... an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identifying any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.'

In my view, the misleading averments, in both the statement and the affidavit supporting the application for the injunction, would be sufficient to justify the discharge of the injunction.

(c) *Siporex Trade SA v Comdel Commodities Ltd* (1986) 2 Lloyd's Rep 428, where Mr Justice Bingham, in fine style, said at p 437 of the report:

> (3) Failure to make full and fair disclosure

> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure. Most of these principles are established by authorities such as *Rex v The Kensington Income Tax Commissioners* [1917] 1 KB 486; *Thermax Ltd v Schott Industrial Glass Ltd* (1981) FSR 289; *Wardle Fabrics Ltd v G Myristis Ltd* (1984) FSR 263; *BankMellat v Nikpour* (1985) FSR 87. The other principles have not been the subject of detailed challenge.

(d) In a book entitled *Commercial Litigation: Pre-emptive Remedies* (3rd Ed) by Iain S Goldrein, at p 64 thereto, the learned author wrote:

> 4 Full disclosure does not mean overloading the court. There is a difference between disclosing material facts, and flooding the court with unnecessary documents. Lloyd LJ said in *National Bank of Sharjah v Dellborg*, The Times, 24 December 1992:
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> > 'The material facts at the ex parte stage were those which were necessary to enable the judge to exercise his discretion properly and fairly between the parties, bearing in mind that he had not at that stage heard the defendants' side of the case, and bearing also in mind the hardship and inconvenience which a Mareva injunction caused.
> >
> > But the place to disclose the facts, both favourable and adverse, was in the affidavit and not in the exhibits. No doubt it would usually be convenient to exhibit a few key documents where it was necessary to do so to explain the case.
> >
> > But the recent tendency to overload the case at the ex parte stage and to burden the judge with masses of documents in case something was left out ought to be firmly resisted.

> If the facts were not fairly stated in the affidavit it would not assist the plaintiff to be able to point to some exhibit from which the fact might be extracted.'

(3) At an ex parte stage, the duty of the applicant is to make proper inquiries for any additional facts in all the circumstances of the case. The case of *Brink's-MAT Ltd v Elcombe & Ors* [1988] 3 All ER 188 is a case in point and it would be sufficient to refer to the headnote:

> A person applying ex parte for a Mareva injunction is under a duty not only to make a full and fair disclosure of all material facts known to him but also to make proper inquiries for any relevant additional facts before making the application, since not only facts known to the applicant but also any additional facts which he would have known if he had made proper inquiries will determine whether there has been material non-disclosure. The extent of the inquiries which will be deemed to be proper will depend on all the circumstances of the case, including the nature of the applicant's case when making the application and the probable effect of the order on the defendant. Whether a fact not disclosed is of sufficienct materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of that fact to the issue to be decided by the judge on the application. The fact that the non-disclosure was innocent, in the sense that it was not known to the applicant or that its relevance was not perceived, is an important, but not decisive, consideration in deciding whether to order an immediate discharge. However, the court has a discretion, notwithstanding proof of material non-disclosure which justifies the immediate discharge of an ex parte order to continue the order or to make a new order on terms.

(4) Even the duty of full disclosure extends to 'without prejudice' negotiations. An array of authorities can easily be cited and they are:

(a) *The 'Giovanna'; Gulf Interstate Oil Corporation LLC And The Coral Oil Co Ltd v Ant Trade & Transport Ltd of Malta.*

(b) *Family Housing Association (Manchester) Ltd v Michael Hyde & Partners (a firm) & Ors* [1993] 2 All ER 567, where the headnote reads as follows:

> **Held**: The contents of without prejudice correspondence could be disclosed in an application to strike out for want of prosecution since the admission of such evidence did not infringe the main considerations of public policy in favour of the general rule excluding reference to without prejudice correspondence, as the parties' willingness to talk frankly about the strengths and weaknesses of their case and make provisional offers would not be inhibited to any significant extent by the knowledge that such negotiations could be referred to for the sole purpose of explaining the passage of time and the conduct of the parties during the negotiations. In any event, if the application to strike out succeeded, the action would be at an end and if it failed and the case proceeded to trial, the material would not be available to the trial judge.

> Furthermore, wider considerations of public policy required the disclosure of without prejudice correspondence in a striking out application in so far as it explained what had transpired between the parties where such activity was relevant to the issues arising on the application to strike out, especially where inordinate and inexcusable delay was alleged. Furthermore, the admission of such material was by no means a one-sided advantage since the defendant might wish to refer to it to show that the plaintiff had not been negotiating sincerely or was dragging his feet. It followed that the appeal would be dismissed.

(c) *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 3 MLJ 4, where Chan Sek Keong J speaking for Singapore's Court of Appeal had this to say at p 8 of the report:

> Counsel indeed so argued, that in relying on the plaintiffs' negotiations with IG by way of defence, the defendant did not waive the privilege with respect to his own without prejudice negotiations with the plaintiffs. He relied on the statement of Goff J in *Sobell v Boston & Ors* [1975] 2 All ER 282 that in rebutting an alleged statement made 'without prejudice', it is quite proper for the other party to supply contrary facts in the event that the court decides that there is no privilege. So it is. But, again, this statement has no application to the facts of the instant case. In *Sobell v Boston* [1975] 2 All ER 282, Sobell, in support of his claim, had referred in his affidavit to a statement as having been made by Boston in a discussion between themselves in connection with their partnership dispute, the subject matter of the action. Boston filed an affidavit in reply, giving his own version of the discussion, and also stating that Sobell had agreed that the whole discussion was without prejudice. Sobell contended that Boston had waived his privilege by letting in evidence in his affidavit in reply. Goff J held that there was no waiver of privilege. He reasoned as follows:
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>> '[*Boston's*] affidavit could not, in my judgment, of itself be a waiver. Where the evidence is given by affidavit, the opposing party is faced with a dilemma. If he says merely 'I am advised that this is inadmissible and I need not answer it', then if the objection is overruled he must seek an adjournment which may not be allowed or only on adverse terms as to costs and if he does not or if his application be not granted, he will be left with no evidence on his side. I cannot think that the privilege can be waived by an affidavit which says, 'I object that my opponent's affidavit is inadmissible because the matter it contains is privileged but in any case should the evidence be received, I say it is wrong, and this is my version.'
>
> In the case before us, it was the defendant who sought to introduce evidence of alleged negotiations between the plaintiffs and IG, through JK, which were admittedly privileged from disclosure without the consent of the plaintiffs. They, following *Sobell v Boston* [1975] 2 All ER 282, could have objected to this evidence being admitted and at the same time filed an affidavit giving their own version of the negotiations. But they did not do it in that manner. What they did was to waive their privilege, if any, in

> respect of the negotiations and at the same time gave their own version of what the negotiations were about. If the plaintiffs' version of the negotiations was the truth, then the relevant issue would be whether the defendant had opened the door to disclosure by adducing evidence of an untrue version of such negotiations. A
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> In *Sobell v Boston* [1975] 2 All ER 282, there was no dispute as to the nature of the discussions and the parties thereto. Here, there is a dispute as to the nature of the negotiations and the parties thereto. This difference was the key to the resolution of this appeal. If a party to an action seeks to adduce in evidence without prejudice negotiations with the other party, the other party is entitled to either object to such evidence being admitted or allow it to be admitted and/or giving his own version of the negotiations. B C

And his Lordship continued at p 9 of the report in these words:

> Counsel for the defendant also submitted that if we allowed the plaintiffs to bring in evidence of their version of the negotiations, we would undermine the public policy considerations which disallow without prejudice negotiations from disclosure, and that we would be opening the floodgates of privilege. We disagreed. In *Rush & Tompkins Ltd v Greater London Council & Anor* [1988] 3 All ER 737, Lord Griffiths said at pp 739h–740d: D
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> > 'The "without prejudice" rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than to litigate them to the finish ... The rule applies to exclude all negotiations aimed at settlement whether oral or in writing from being given in evidence... However, the application of the rule is not dependent on the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of the negotiations will, *as a general rule*, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice". *I believe that the question has to be looked at broadly and resolved by balancing two different public interests, namely, the public interest in promoting settlements and the public interest in full discovery between the parties to litigation.*' (Emphasis added.) E F G
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> In the balance of competing public interests, we had no doubt whatever where the balance fell in the instant case. The purpose of the rule is to encourage litigants to settle their differences, without fear of negotiations being admitted in evidence if no settlement is reached. A party may wish to settle a claim, although he may think that he is not liable. But 'the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it'. (per Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council & Anor* [1988] 3 All ER 737 at p 740e). In the circumstances of this case, to hold otherwise will H I

> encourage the suggestion of evidence which may prove what is false and the suppression thereof which may prove what is true. That is not the object of the rule.

(d) *A-B Chew Investments Pte Ltd v Lim Tjoen Kong* [1989] 3 MLJ 328, where Coomaraswamy J had this to say in regard to a 'without prejudice' correspondence in these words (see pp 330–331 of the report):

> The law on the admissibility of statements made 'without prejudice' or in 'without prejudice' negotiations is found in s 23 of the Evidence Act (Cap 97, 1985 Ed) which reads:
>
>> 'In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.'
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> In the Evidence Act [1980], an 'admission' is not necessarily a statement adverse to the party making it. Section 17(1) defines it as:
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>> 'An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned'.
>
> Section 23 merely states a broad principle and does not specify detailed rules. For this, we must look to English law. Sir James Fitzjames Stephen, who drafted the Indian Evidence Act 1872 (the direct parent of our Act, originally enacted in 1893), also wrote a digest of the law of evidence and his art 20 is, with immaterial differences, identical to s 23 of our Act. In effect, therefore, the English common law on 'without prejudice' statements in civil cases is part of our law.
>
> The privilege only applies to statements by the parties and solicitor; respectively acting for them. *La Roche v Armstrong* [1922] 1 KB 485. If a part took no part in the 'without prejudice' negotiations, either personally or through an agent, he cannot claim the privilege. There is a glaring inconsistency in this affidavit filed by the defendant on the crucial point of the defendant's participation which has not been satisfactorily explained. I am satisfied that the defendant is not entitled to claim the privilege.
>
> Although this ground alone is sufficient to dispose of the application, I am also of the view that the privilege has in any case been waived by the defendant. It is clearly established that the privilege can be waived with the consent of both parties: *McTaggart v McTaggart* [1949] P 94. The privilege may be waived by the person entitled to claim it, either expressly or by allowing evidence to be given of matters in respect of which privilege might have been claimed: 17 *Halsbury's Laws of England* (4th Ed) para 235. It is abundantly apparent from the exchanges in the affidavits filed that both parties have delved at considerable length on the contents of the negotiation; and have referred to matters which would otherwise be privileged.

(e) *Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors* [1999] 5 MLJ 449, where I said at pp 457–458 of the report: A

> It must be emphasized that the shield of privilege is that of the client and not that of the lawyer. This has been held by the English and Australian judges since time immemorial. Two English cases may be cited: *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at p 646 and *AG v Mulholland; AG v Foster* [1963] 2 QB 477 at p 489. B One Australian case would suffice: *Freer v Freer* (1956) SASR 163 at p 169. In short, it is only the client that can waive that shield of privilege (*Proctor v Smiles* (1886) 55 LJ QB 467 at p 528; *Minter (Pauper) v Priest* [1930] AC 558 at p 579; *Baker v Campbell* (1983) 57 ALJR 749, and *Southern Cross Commodities Pty Ltd (In Liquidation) v Crinis* (1948) VR 697 at p 698). C These are general rules, and they may take a different complexion depending on the role of the lawyer in question. Thus, a lawyer representing his client in an action is said to be '... the agent of his client in all matters that may reasonably be expected to arise for decision in the cause' (*Matthews v Munster* (1888) 20 QBD 141 and *Griffiths v Evans* [1953] 2 All ER 1365 at p 1371). D Thus, as a lawyer for his client in an action, that lawyer can waive the shield of privilege (*Great Atlantic Insurance Co v Home Insurance Co & Ors* [1981] 1 WLR 529; [1981] 2 All ER 485). I need to examine briefly the case of *Great Atlantic Insurance*. There, it transpired that at the trial, the counsel read a particular document, not realizing that the document was incomplete. E The remainder of that document was privileged. The court construed it adversely against the counsel and held that as it had been deliberately introduced into the court record, and as the document dealt with only one subject matter and was thus indivisible into distinct segments the party concerned must therefore disclose the whole document to the court. Even waiver through cross-examination was vigorously applied in *Burnell v British Transport Commission* [1956] 1 QB 187. F Here, waiver of Mr Mohd Fairuz bin Abdullah was by conduct when the 'without prejudice' letter was exhibited and annexed to encl 4. The decision and the rationale behind the case of *Great Atlantic Insurance Co*, may lie in the need of the court to satisfy itself by perusing through the documents and thereby releasing the shield of privilege. G The justice of the case demands just that, for otherwise, the actual weight and meaning to be attached to the document would be lost and be misunderstood (*Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corp (No 2)* (1981) Com LR 138, as applied vigorously in *General Accident Fire and Life Assurance Corp Ltd & Ors v Tanter & Ors, The Zephyr* [1984] 1 All ER 35 at p 43; *Attorney-General (NT) v Maurice* (1986) 69 ALR 31). H Justice too requires this court to examine in depth all the letters whether open or 'without prejudice' in encls 3, 4, 7 and 11. Mr Mohd Fairuz bin Abdullah must be held accountable for waiving the shield of privilege and, with respect, he too may be estopped from denying the waiver.

The present case may also be considered to be an implied waiver. I The potent question to ask is this: Would it be unfair to maintain the privilege? This was also the question that the court in *Attorney-General (NT) v Maurice*, asked itself. An implied waiver of the

> privilege would mean that the court would apply the principle of fairness to determine the extent of the enquiry as a result of that waiver (*General Accident Fire and Life Assurance Corp Ltd & Ors v Tanter & Ors, The Zephyr*) and the extent of the enquiry must be confined to the documents waived and no further. Other documents not waived would not be examined by the court as it would not be fair to the waiving party for the waiver to extend to other documents, thereby causing an overwhelming ripple of discovery (*Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corp (No 2)*). In my judgment, all the letters open and labelled 'without prejudice' in encll 3, 4, 7 and 11 have been waived and only these documents will be considered and weighed by the court in determining encl 5 and no more. There would certainly be 'no ripple of discovery' that would be unfair to the plaintiffs. It is a correct assertion to say that central to the issue of waiver would be the principle of fairness. No judge in the world can restore a privilege that has been waived even though such waiver was mistakenly made. It is my judgment that it is difficult for the judges to pretend that the privileged information which has been revealed has not been exposed (*Re Briamore Manufacturing (In liquidation)* [1986] 3 All ER 132 and *Great Atlantic Insurance Co v Home Insurance Co & Ors* [1981] 1 WLR 529 at pp 540–541). I hold the view that in the interest of a fair trial, litigation should be conducted on the footing that all relevant documentary evidence is made available to the court. The present case is not an exception.

(f) *Oh Kuang Liang v Associated Wood Ind Sdn Bhd* [1995] 4 MLJ 390, where, at pp 394–395 of the report, I said:

> It appears therefore that the 'without prejudice rule' is a rule governing the conduct of the trial, in particular controlling the admissibility of evidence and is founded on the time honoured public policy of encouraging litigants to settle their differences rather than litigate them in a court of law. Court battles are to be avoided if the parties could settle their differences amicably.
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> I am of the considered view that the 'without prejudice rule' applies generally to exclude all negotiations genuinely aimed at settlements whether oral or in writing from being given in evidence. A prudent and competent solicitor will always be on guard and will always label any negotiating correspondence with the words 'without prejudice' — to make known and to make clear beyond doubt that in the event the negotiations fell through, they are not to be referred to at the subsequent trial. I think the correct approach to resolve the 'without prejudice rule' would be by balancing two different public interests, namely, the public interest in promoting settlements, on the one hand, and the public interest in full discovery between parties to litigation, on the other.
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> I have done some research and I have discovered that nearly all the cases where the scope of the 'without prejudice rule' has been considered concerned the admissibility of evidence at the trial after negotiations have failed. It is quite obvious that in these situations no question of discovery arises because the parties are well aware of what had transpired between them in the negotiations. It is not

incorrect to say that the underlying purpose of the 'without prejudice rule' is to protect a litigant from being embarrassed by an admission made purely in an attempt to achieve a settlement. Lindley LJ held in *Walker v Wilsher* (1889) 23 QBD 335 at p 337, that the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement and this point seems to have been applied in *Tomlin*. I must at once sound a warning that *Walker v Wilsher* is not an authority for the proposition that if the negotiations succeed and a settlement is concluded, the privilege is thrown to the wind, having served its purpose. On a proper reading of *Walker v Wilsher*, I would have thought that there it was held that it was not permissible to receive the contents of a without prejudice offer on the question of costs and no question arose as to the admissibility of admissions made in the negotiations in any subsequent proceedings. *Cutts & Head* propounds the principle that in certain circumstances the without prejudice correspondence may be looked at to determine a question of costs after judgment has been given. In *Re Daintrey, ex p Holt* [1893] 2 QB 116; [1891–4] All ER 209, the court refused to allow the 'without prejudice rule' to exclude an act of bankruptcy and in *Kitcat v Sharp* (1882) 48 LT 64, the court too refused to be bound by the 'without prejudice rule' when its purpose was to suppress a threat if an offer is not accepted. I am of the view that the exceptions referred to in these cases should not and must not be allowed to whittle down the protection given to all parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails, the maker should not be held accountable and the admission of the facts made for the purpose of the compromise should not be received in evidence. I am not prepared, to borrow the words of Ormrod J in *Tomlin*, to lift the umbrella of 'without prejudice' for the applicant. Rain or shine, that umbrella should remain. I am fortified in my view by the passages appearing in the judgment of Chang Min Tat FJ, in *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17, to the effect that:

> 'It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.'

With respect, had *Malayan Banking Bhd v Foo See Moi* been brought to the attention of the learned judge in *Aluminium Industries Sdn Bhd v Cookermate (M) Sdn Bhd*, the decision arrived at might be different.

(g) *McFadden v Snow* (1952) The Weekly Notes — Vol 69, at p 8 and, at pp 9–10, Kinsella J had this to say:

> Mr Hicks strenuously objected to this tender on the ground that the letter was expressed to be without prejudice. It admittedly was not answered by the claimant, Mr McFadden. It appears to me that I must admit this letter to disprove the statement in the affidavit which I have underlined that the claimant had received no reply to his letter. The alleged failure to receive a reply is highly significant for the purpose of establishing an admission (by silence) on the part of Ms Jobson that she had surrendered her tenancy and that the claimant as landlord had accepted the surrender whereby the tenancy would be extinguished by operation of law.
>
> Mr Hicks contended that the letter from Ms Jobson's solicitors was not a reply to the letter set out in the affidavit. This, I think, is beside the point, for whether it is or is not strictly a reply, it is utterly repugnant to an admission by silence that Ms Jobson had surrendered her tenancy. The privilege that may arise from the cloak of 'without prejudice' must not be abused for the purpose of misleading the court and on that ground, I admitted the letter to negative the inference that otherwise might quite erroneously have been raised in the claimant's favour.

(h) *Pitts v Adney* (1961) 78 WN (NSW) 886, where Walsh J said at pp 888–889 of the report:

> Now, I agree entirely that it was relevant to a proper enquiry into that case to know, if it were the fact, that the lessor could then obtain 5,300 pounds for the property without obtaining any order, simply by accepting an offer then made to buy at that price. Belated as this willingness to pay 5,300 pounds may have been, clearly the magistrate could properly have had regard to it in weighing up the problem of competing hardships, and in considering all the relevant circumstances.
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> It seems clear to me, also, that the lessee could have put this fact before the court without any question ever arising as to giving evidence of privileged communications. For, assuming that the lessee, with the support of her family, was really willing to buy at that price, the court could have been asked for leave to recall her to say so. This would not be to give evidence of an offer made at the conference, but to give direct evidence of her willingness to buy at that price.
>
> When the rescission application came on, there was evidence of willingness to buy at that price, as at 11 August. In the absence of any further evidence on the point, and in view of the course the earlier proceedings had taken, it would be natural for the magistrate to suppose that it was at 11 August that the lessee had first been willing to pay 5,300 pounds. He would infer that this was the fact. But if it then appeared that he regarded this as a very important circumstance, I see no reason why it would not have been open to the lessee to give evidence to show that it was not the fact. The lessee could have gone into the witness box to say that she had been willing to pay 5,300 pounds on 27 July. Let it be then supposed that the lessor's counsel thereupon raised the point that earlier willingness was of no importance or relevance, unless it was shown that it had been communicated to the lessor and that, in order to meet this, the

> lessee sought to give evidence that it had been communicated at the conference. In the hypothetical situation which I have supposed, an objection to that evidence upon the ground of privilege would, in my opinion, be very properly rejected.
>
> It is of importance that the rule protecting from disclosure, discussions taking place in an endevour to put an end to pending litigation should, in general, be applied. But it is, after all, a rule based upon public policy. It cannot be permitted to put a party into the position of being able to cause a court to be deceived as to the facts, by shutting out evidence which would rebut inferences upon which that party seeks to rely. In *McFadden v Snow* (1951) 69 WN (NSW) 8, evidence was given on behalf of one party that no reply had been received to a letter. Thus it was sought to establish an admission by silence as to a relevant fact. Kinsella J admitted a letter headed 'without prejudice' tendered in disproof of that evidence. He said at p 10: 'The privilege that may arise from the cloak of "without prejudice" must not be abused for the purpose of misleading the court'. With respect, I state my emphatic agreement with that observation. If one applies it to the situation which I have postulated, as that which could have arisen if these proceedings had followed a more formal course, the result would have been that the claim of privilege could not have been used to mislead the court into acting on the erroneous belief that no offer of 5,300 pounds had been made by the lessee, or communicated to the lessor, before the making of the order of 27 July.

(5) There must be compliance with O 29 r 2A(c) of the Rules of the High Court 1980 ('the RHC') which requires reasons to be stated by affidavit as to why notice is not given at the time of the application for an ex parte injunction. The applicant too must comply with O 29 r 2A(d) and (e) of the RHC which requires full disclosure of all material facts known to the plaintiff. It is said that r 2A of the RHC has to be complied with strictly. An authority that immediately comes to mind would be that of *Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605, a decision of the Court of Appeal (with the coram comprising Gopal Sri Ram, NH Chan JJCA and Ahmad Fairuz J), where Gopal Sri Ram JCA writing for the Court of Appeal aptly said at p 611 of the report:

> The provisions of O 29 r 2A were introduced by amendment in order to ensure that ex parte injunctions of any sort were not granted willy-nilly, but only in cases where they were truly called for. In order to ensure that the policy behind the introduction of r 2A is not defeated, High Courts must demand strict compliance with its terms. More so, when the relief applied for is in the nature of a Mareva or Anton Piller type of injunction because of the incalculable harm and damage that may be caused to a defendant by the grant of either of these orders.
>
> Having perused the affidavit in question, we find that there has not even been a feeble attempt to meet the requirements of r 2A, especially sub-para (d) thereof. On this ground alone, the ex parte injunction ought to have been dissolved by the learned judge.

(6) But, while an applicant seeking an ex parte relief must make full disclosure to the court of all facts which are material and if such disclosure is not made, the court may discharge the ex parte injunction on that ground alone, yet the court is empowered at an inter partes stage, notwithstanding the earlier failure of the applicant to make such a disclosure, to make, as justice requires, an order either continuing the ex parte injunction or to grant a fresh injunction. There is no absolute right to have an ex parte order obtained without due disclosure to be set aside — it is entirely up to the discretion of the court whether to set it aside or not. Support for these legal propositions can be seen in the case of *Dormeuil Freres SA and Anor v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197, where Sir Nicolas Browne-Wilkinson VC succinctly said at p 199 of the report:

> I will deal first with the application to set aside the ex parte order. It is a basic principle, applicable to all ex parte applications, that a plaintiff seeking ex parte relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the ex parte injunction on that ground alone. But if, in the circumstances existing when the matter comes before the court inter partes, justice requires an order either continuing the ex parte injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an ex parte order obtained without due disclosure set aside; there is a discretion in the court whether to do so or not.

(7) The applicant for an ex parte injunction, must show that he has the ability to satisfy the undertaking to pay damages in the event it is found that the ex parte injunction should not have been given. The following authorities would support this proposition:

(a) *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd Goh Keat Poh (Wasi dan pemegang amanah harta pusaka Chor Sin Khen, si mati) dan lain-lain lwn Farlim Properties Sdn Bhd* [1997] 3 MLJ 90 (CA), where the headnote carried the following words (see pp 92–93 of the report):

> **Held**, allowing the appeal:
>
> (1) From the facts of the case, it was clear that the respondent had failed to prove on the balance of probabilities that it was capable of executing the undertaking on damages when the time came, especially if examined from the angle that three years had passed, the respondent was still not ready to settle the purchase price.
>
> (2) Regarding the issue of damages being a sufficient remedy (which was not raised in the court below), the respondent had the burden of proving that damages was not a sufficient

> remedy to give him the right to obtain the injunction, and the matter whether damages was or was not a sufficient remedy was a matter of law which must be proved by the applicant. It was an issue of law and would cause injustice if not considered.

(b) *JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd & Anor* [1987] 1 MLJ 312, where Zakaria Yatim J said at p 313 of the report:

> Apart from duplicity of proceedings, the first defendant should succeed in his application on the ground that the plaintiffs' undertaking, as to damages, cannot be enforced as they have no assets within jurisdiction. All the plaintiffs are foreign companies resident abroad. The plaintiffs, in their affidavit affirmed on 4 February 1986, admitted that they 'do not have any assets within the jurisdiction of this court'. If the plaintiffs do not succeed at the trial, the first defendant would suffer damages which the plaintiffs cannot compensate.

(c) *United Gold Holdings Sdn Bhd v Malaysia Mining Corporation Bhd & Anor* [1987] 2 CLJ 272, where at p 274 of the report, VC George J had this to say:

> Apart from that, I was far from satisfied that the undertaking in damages was meaningful. The plaintiff had not been able to demonstrate that they could meet such an undertaking.

(d) *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors* [1995] 1 MLJ 193, where Gopal Sri Ram JCA said at p 207 of the report:

> If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiffs ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee.

(e) *Allen & Ors v Jambo Holdings Ltd & Ors* [1980] 2 All ER 502, where Lord Denning MR said at p 505 of the report:

> There is one other point that I must mention. It is said whenever a Mareva injunction is granted, the plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw LJ said in the course of the argument, a legally aided plaintiff is by our statutes not to be in

A

> any worse position by reason of being legally aided than any other plaintiff would be. I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft.

B

(f) *Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426, where Shankar J said at p 441 of the report:

C

> In the light of the material before me, I was satisfied that the undertaking as to damages given by the first plaintiff was a barren one because although challenged, he had not responded with any evidence of means.

Continuing at the same page and spilling over to p 442 of the report, bis Lordship Shankar J said:

D

> A bare undertaking as to damages may be 'usual' as to form, but useless as to content unless the plaintiffs are worth powder and shot. I therefore hold it to be the right of the defendants to be told what the undertaking is worth in real terms.

(g) *Intercontex & Anorv Schmidt & Anor* (1988) Fleet Street Reports 575, where Peter Gibson J said at p 579 of the report:

E

> The plaintiffs have provided no proper evidence that they would be able to satisfy the cross-undertaking in damages, this despite a request on behalf of Mr Bremer on 5 April for financial details of the plaintiffs.

F

(h) *Brigid Foley Ltd v Ellott & Ors* (1982) RPC 433, where Sir Robert Megarry VC said at pp 435–436 of the report:

> I should have been reluctant to dismiss the motion simply on the grounds of a failure to put in evidence of that balance sheet; but I would emphasize that in applications for injunctions, especially since *Cyanamid*, one of the important matters always to be dealt with is the ability of a plaintiff to meet an undertaking in damages. That is a matter which should be dealt with by specific evidence and not left to be mentioned at the hearing of the motion by reference to an unaudited balance sheet which the other side has presumably not seen.

G

H Applying these propositions of the law and after taking into account the sage words of the judges in the long line of authorities as set out above, I must make several findings and those findings would be on the following lines:

(1) that the plaintiffs have, at an ex parte stage, disclosed all the material facts within their knowledge;

I

(2) that the plaintiffs have also anticipated the likely defence at the ex parte stage when it alluded to Civil Suit No S2–22–263–97;

(3) that the doctrine of res judicata has no application to the factual matrix of the present case because of the very nature of the terms of the consent judgment that was reached in Civil Suit No S2–22–263–97 and this was confounded by the fact that the merits of that civil suit were not explored at all; **A**

(4) that even if the plaintiffs failed to make the full disclosure to this court of all the facts at the ex parte stage, yet this court at the inter partes stage has the discretion to either grant the continuation of the ex parte injunction or to grant a fresh injunction, bearing in mind that there is no absolute right to have an ex parte order that was obtained without full disclosure to be set aside automatically (*Dormeuil Freres SA and Anor v Nicolian International (Textiles) Ltd)*; **B** **C**

(5) that at an inter partes stage, this court is empowered to either allow the continuation of the ex parte injunction or to grant a fresh injunction notwithstanding the failure to disclose all the relevant facts at the ex parte stage;

(6) that the plaintiffs have given an undertaking as to damages in encl 4 and even if the plaintiffs were poor — here there was no evidence of that, the plaintiffs would still get a shot at that injunction; **D**

(7) that the reasons to proceed ex parte have been set out in encl 4;

(8) that 'as a matter of convenience' and after 'balancing one side against the other' (borrowing the words of Lord Denning & Ors in *Allen & Ors v Jambo Holdings Ltd & Ors)*, the injunctions sought in encl 11 should be granted in favour of the plaintiffs; and **E**

(9) that there were serious questions to be tried and these were amply set out in this judgment.

Lest I be accused of an oversight, I must now proceed further. **F**

Although the declarations that were prayed for in Civil Suit No S2–22–263–97 were similar to prayers 4 and 6 of the present suit, yet the present suit as seen in encl 2 and not encl 3 carried other prayers as well. There was one similarity between Civil Suit No S2–22–263–97 with that of the present suit. It was this. That there was a declaration that the property is a trust property held by the defendant in favour of all the brothers and sisters, including the plaintiffs and the defendant. But the issue of trust was not adjudicated upon and it was specifically agreed by consent that the trust status of the property be preserved by reverting the parties to their positions prior to 1992 in relation to the trust property. The status of the property as a trust property was not in doubt because the defendant herself in Civil Suit No S2–22–263–97 had admitted the existence of the trust in paras 3, 4, 6 and 7 of the statement of claim in that suit as well as in the police report lodged by the defendant against the second plaintiff. I will now reproduce paras 3, 4, 6 and 7 of the statement of claim in Civil Suit No S2–22–263–97 as seen in exh 'NN19' of encl 8: **G** **H** **I**

> 3 Plaintif pernah miliki hartanahnya dipegang dibawah Hakmilik Geran No 26496, Lot 211, Seksyen 96, Negeri Wilayah Persekutuan (geran lama

> No GRT 12688) yang juga dikenali sebagai Rumah No 18, Lorong Maarof, Jalan Bangsar, Kuala Lumpur dipegang oleh plaintif sebagai pemilik tunggal dan plaintif juga pegang hartanah itu sebagai 'inherited property' dan telah melaburkan semua wang simpanannya untuk memperolehi hartanah itu.
>
> 4 Pada atau dalam tahun 1992 beberapa adik beradik dan plaintif serta defendan telah adakan beberapa perbincangan dan rundingan. Dalam rundingan itu plaintif dan adik-beradik di satu pihak bersetuju bahawa nilai hartanah telah meningkat dan oleh yang demikian hartanah itu harus diperbaiki dan ubahsuaikan supaya nilainya akan meningkat lagi dan pihak-pihak itu juga setuju bahawa kerana plaintif telah pun bersara dan tidak mampu untuk menanggung kerja-kerja ubahsuaian substantif itu maka defendan bolehlah menanggungnya bagi pihak plaintif dan adik beradik perempuannya yang tinggal di rumah itu kerana defendan adalah ketika itu banyak pendapatan dan layak untuk ambil sebarang pinjaman yang cukupi. Persetujuan dan/atau persefahaman dicapai oleh semua adik beradik yang terlibat di kalangan beberapa kawan-kawan keluarga dalam beberapa perbincangan itu.
>
> 6 Berdasarkan akujanji itu dalam tahun 1995, plaintif juga ambil langkah untuk pindah milik hartanah itu dan juga sempurnakan proses pindah milik pada bulan Oktober 1995. Sebelum pindah milik itu, defendan ada memberi sejumlah RM185,000 secara ansuran untuk disimpan sebagai jumlah wang separuh dan jumlah anggaran pinjaman RM450,000 yang defendan anggarkan untuk membelanjakan terhadap rumah itu. Tetapi setelah pindahkan milik kepada namanya, pendekatan defendan telah berubah sama sekali dan ia menyatakan bahawa rumah itu dia yang punya dan menafikan sebarang hak terhadap hartanah itu kepada plaintif atau adik beradiknya.
>
> 7 Plaintif merasai bahawa dia dan adik beradiknya mungkin ditipukan oleh defendan dan plaintif tidak ingin hilangkan hartanahnya. Plaintif serta adik-beradiknya meminta defendan supaya ianya dipindahkan balik kepada plaintif dan defendan walaupun bersetuju pada mula-mulanya, kemudian enggan berbuat demikian dan menegaskan rumah itu milikan dia secara mutlak dan tidak ingin memberikannya semula kepada plaintif.

While the police report lodged by the defendant against the second plaintiff can be seen in exh 'NN16' of encl 8, and I will now reproduce that police report:

> NAMA ORANG YANG BUAT REPOT: NIVEDITA A/P NAGANATHER
> Saya mempunyai rumah No 18, Lorong Maarof, Jalan Bangsar. Pada tahun 1995, saya benarkan adik saya En Arumugaswamy supaya tukarkan rumah itu ke atas namanya supaya dia boleh ubahsuaikan rumah dan serahkan balik pada saya serta adik-beradik saya. Pada seluruh masa saya simpan dokumen hak milik rumah itu pada saya.
>
> Adik saya, En Arumugaswamy, tidak buat sebarang kerja perbaikan pada rumah itu seperti yang dijanjikan. Tiba-tiba pada 3 March 1997, dia mengancam kami bahawa dia akan cederakan dan/atau bunuh kami jika kami tidak menyerahkan dokumen hak milik pada beliau. Dokumen itu ada pada peguam saya Tetuan Veloo & Co, Kuala Lumpur kerana dia menjalankan kes tentang hakmilik rumah itu. Saya perlukan pembantuan polis kerana

> kesemua kami yang tinggal di rumah itu adalah perempuan dan tidak terdaya untuk buat apa-apa. Kini En Arumugaswamy semakin hari semakin mengganas.
>
> Sekian repot saya.

All these would show that the issue of the property being a trust property was a real issue that must be adjudicated upon by way of full trial. At common law, there are three types of trusts that are recognized, namely, the express, the implied and the constructive trusts. An express trust is created when the settlor expressly creates the trust for the benefit of the third party or the settler himself as a beneficiary. An express trust can be created formally or informally. In a situation where the settlor uses 'clear and unequivocal words' (*Wan Naimah v Wan Mohamed Nawawai* [1974] 1 MLJ 41) in order to manifest his intention to create the trust, there would not be a problem to determine the existence of the trust. An implied trust arises where the circumstances prevailing require the law to presume that a trust was intended to be in existence despite the absence of specific language creating an express trust. A unique example of such a trust would be the resulting trust. In essence, a resulting trust arises by presumption where one party buys a piece of property and registers it in the name of a second party in circumstances where the first party has supplied the money for the purchase. In this way, the registered proprietor is presumed to hold the property on trust for the person who has supplied the money. In *Dharmaratna v Dharmaratna* [1939] MLJ 310, the presumption that the property was a gift to the registered party was quite overwhelming where the first party that supplied the money was in loco parentis to the second party. A constructive trust, on the other hand, is sometimes referred to as an implied trust. A case in point would be where the court, in exercising its equitable jurisdiction, imposes a trust on a party who has the control of the property of which he is not entitled to. The trust is presumed to exist otherwise it would be difficult for a person claiming the beneficial interest to the property to stake his claim. It is pertinent to note that constructive trusts have developed by leaps and bounds (*Boase v Cluny Rubber Estate Ltd* (1913) 1 FMSLR 130; *Paruvathy d/o Murugiah v Krishnan s/o Doraisamy* [1983] 2 MLJ 121; and *Muschinski v Dodds* (1985) 160 CLR 503) over the years.

Reverting to the case at hand, the consent judgment entered into in Civil Suit No S2-22-263-97 was not a consent judgment between the parties on the issue of trust because it was specifically agreed by consent that the parties would revert to the 1992 status in respect of the said property. Incidentally, the defendant must be estopped from alleging that res judicata 'applied to the present case because she herself had consented that the parties would revert to their original positions in relation to the trust property, wherein each party would preserve its right to the trust property. It was the stand of the plaintiffs that the defendant was now precluded from raising the doctrine of res judicata as an answer to the plaintiffs' claim. It was submitted on behalf of the plaintiffs that the defendant having consented to the parties reverting to the original status in regard to the said property under the consent judgment, was now making an attempt to unlawfully evict the plaintiffs from the said property. It must be borne in mind that the defendant was not asking for vacant possession of the said property in Civil Suit No S2–22–263–97 and it must also be remembered that before, during and after the subsistence of that suit, the parties were all residing in the said property.

As far as the doctrine of res judicata was concerned, the first plaintiff was not a party to Civil Suit No S2–22–263–97, and so the first plaintiff cannot be governed by the doctrine. In regard to the second plaintiff, the doctrine also had no application because by consent it was agreed that the parties would revert to their 1992 status in relation to the said property. It must be recalled that after the property was transferred to the defendant's name, the plaintiffs continued to reside in the said property and all these would strengthen the status of the property as trust property.

The plaintiffs took exception to the defendant's submissions that the plaintiffs' claims were wholly unsustainable, frivolous, vexatious and an abuse of the process of the court. The plaintiffs referred to para 9 of the statement of claim which reads as follows (see encl 2 thereof):

> Plaintif pertama memiliki dua (2) bahagian di tanah tersebut, satu kepunyaan plaintif pertama sendiri dan satu lagi adalah bahagian kakak plaintif pertama iaitu Ishwari yang telah diberi kepada plaintif pertama atas arahan emak plaintif pertama sebagai balasan bagi satu pinjaman yang telah plaintif pertama ambil untuk emas kahwin perkahwinan Ishwari kepada S Viswanathan.

Translated into the English language, para 9 of the statement of claim clearly shows that the first plaintiff in fact has two shares, one belonging to her in her own right and the other being her sister (Ishwari's) share which was given to the first plaintiff by Ishwari on the mother's instructions in consideration for a loan taken by the first plaintiff which was utilized as dowry for Ishwari's marriage to S Viswanathan. It would be ideal to note that in para 21(a) of encl 10, it was clearly stated that the transfer document in respect of Ishwari's share was prepared by one Paramalingam from the Public Trustee's office and it was given to the late mother who in turn handed it to the defendant. This averment was never denied by the defendant at all. The first plaintiff's loan application to the JCS can be seen in exh 'P15' of encl 42 which stated, inter alia, that 'the purpose of applying for the loan was to assist the mother towards the expenses of the jewellery, etc of my sister'. Of pertinence would be the fact that the second surety for the JCS loan was the defendant herself — see exh 'P15' of encl 42. But now the defendant was attempting to challenge the legality of the JCS loan taken by the first plaintiff to her advantage. The defendant said that that JCS loan that was utilized as 'dowry' was null and void. This assertion was not raised nor pleaded by the defendant in her statement of defence as well as in her affidavits. It was submitted on behalf of the plaintiffs that the dowry system is widespread among the Ceylon Tamils, especially among the educated class who made excessive demands from the bride's family to marry off their daughters. In the plaintiffs' case, it was submitted that the first plaintiff merely took a loan on her late mother's instruction, although she was under no obligation to do so. But as a dutiful daughter, the first plaintiff obliged her late mother and borrowed the money to enable the late mother to raise the dowry in order to ensure that Ishwari was married off. If this was not done, so the submission went, it was said that Ishwari would also be single, unmarried and would occupy the said property as a beneficial owner. It was submitted that the defendant now had the audacity to allege that the first plaintiff's sacrifice in borrowing the money from the JCS in order to raise the money to assist the late mother in marrying off Ishwari was an illegal act. This showed the extent to which the defendant was prepared to lower her dignity in order to secure the entire property to herself. So the submission went.

In regard to the 'will', the plaintiffs had this to say:

(1) the 'will' was dated 27 May 1983 (exh 'NN14' of encl 8) which made the defendant the late mother's absolute beneficiary and this runs counter to the defendant's letter dated 10 May 1983 (exh 'NN10' of encl 8) to the housing department wherein the defendant said that it was to purchase the half shareregistered in the late mother's name;

(2) that the late mother did not intend the defendant to be the absolute beneficiary as alleged under the 'will';

(3) that the defendant's allegations that the late mother was in financial difficulties and wanted to pay off her creditors were wrong and misconceived;

(4) a question was posed: would the late mother leave two other unmarried daughters, namely, Siva Ananda Devi and the first plaintiff living with the late mother in the said house wherein the property stood, out of the 'will'?;

(5) that neither Siva Ananda Devi nor the first plaintiff who were living in the same house as the late mother were called to witness the attestation of the 'will';

(6) that the witnesses to the 'will' were the brothers by the name of Somasundram who hailed from Malacca and one T Jeyaraj, the youngest sister's husband whose address was listed as No 18, Lorong Maarof, Off Jalan Bangsar, Kuala Lumpur but he was not residing there; and

(7) that the first plaintiff only came to know and became aware of the existence of the 'will' after she received the notice to quit whereas the second plaintiff only knew about the 'will' in 1997 when the matter was made known through Civil Suit No S2–22–263–97.

It was argued on behalf of the defendant that the late mother sold her undivided half share in the said property to the defendant and that the late mother had received the purchase consideration of RM90,000 on 27 January 1984. A copy of the transfer as seen in exh 'NN9' of encl 8 and the receipt signed by the late mother as seen in exh 'NN13' of encl 8 were relied upon by the defendant as proof thereof. But the plaintiffs argued that there was no evidence provided by the defendant to show that the late mother had received the alleged consideration of RM90,000 on 27 January 1984. The plaintiffs challenged the acknowledgment in the memorandum of transfer as seen in exh 'NN9' of encl 8 and the plaintiffs also disputed the alleged receipt signed by the late mother as shown in exh 'NN13' of encl 8. According to the plaintiffs, exh 'NN13' of encl 8 which was worded in this way:

> Ref: DR/jkl429/83
>
> Sale of Property held under Grant
> 12688 Lot 211 Section 96 Kuala Lumpur – half share
> RECEIVED from Messrs Lovelace & Hastings the sum of Dollars Ninety Thousand only ($90,000.00) being the full purchase price of the above property. Dated this 27 January 1984
>
> Sgd (Illegible)
> MANICKAM w/o NAGANATHER

cannot be construed to be evidence of an acknowledgment of the sum of RM90,000 from Messrs Lovelace & Hastings for the following reasons:

(1) that acknowledgment was not on the letterhead of Messrs Lovelace & Hastings nor on the invoice bearing the name of Messrs Lovelace & Hastings;

(2) it failed to state how the sum of RM90,000 was paid and there were no details pertaining to the mode of payment; and

(3) the cheque from the Government of Malaysia for the sum of RM90,000 was made payable to Messrs Lovelace & Hastings as stakeholders as reflected in exh 'NN11' of encl 8 and it was inconceivable that payment would be made by Messrs Lovelace & Hastings without setting out the particulars of the mode of payment and without using any letterhead whatsoever.

But what was certain was this. That all these interesting arguments must be ventilated once again in an open court hearing. I kept an open mind and anxiously await for the open court hearing.

The defendant took comfort in the fact that she is the registered owner of the said property. The defendant relied on s 89 of the National Land Code ('the NLC') which enacts as follows:

> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence —
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and
>
> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as

> the same are required by any provision of this Act to be specified or referred to in that document. A

The plaintiffs, on the other hand, argued that s 89 of the NLC must be read with s 340 of the same Code. Concisely put, s 340 of the NLC deals with the indefeasibility of title and interest of a registered proprietor. The plaintiffs argued that s 340 of the NLC does not preclude the court from going behind the register document of title to the property to enable the court to enforce the trust. In *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, Syed Agil Barakbah SCJ, writing a separate judgment, had this to say at p 463 of the report in regard to the issue of trust: B

> The Torrens system as codified by the National Land Code 1965 deals with registration of land and provides simplicity and certitude in transfers of land. It is a system of conveyancing and provides indefeasibility of title to a registered owner of land against any rival claimants except in the case of fraud or similar misconduct as provided under s 340(2) of the Code. It does not prevent or restrict the creation of beneficial interests in land by way of express, implied or resulting trust arising by operation of law in Malaysia by virtue of s 3 of the Civil Law Act 1956. It does not abrogate the principles of equity but alters the application of particular rules of equity in so far as is necessary to achieve its special objects. In this way, the court is entitled to exercise jurisdiction in personam to insist upon proper conduct in accordance with equitable principles and norms (see *Wilkins & Ors v Kannammal* [1951] MLJ 99, at p 100; *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44, at p 45; and *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159, at pp 164-165). C D E

Continuing at p 464 of the report, his Lordship Syed Agil Barakbah SCJ had this to say:

> The main question before the Privy Council in *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44, 45 was whether the Registrar's caveat under s 320 of the National Land Code was properly entered and the word 'interest' under sub-s (l)(b) thereof required interpretation. It was concluded that the interests which the registrar is empowered to protect under s 320(1)(b) of the Code are confined to interests in the land that are recognized by the Code as being either registrable or otherwise entitled to protection. That, in my view, supports the proposition that the restriction under the Torrens system does not prevent the creation of beneficial interests in land whether under express trusts, or constructive trusts or resulting trusts arising by operation of Malaysian law derived from the rules of equity in force in England in 1956. F G

The Privy Council in *Yew Phaik Hoon v Quah Ooi Keat & Anor* [1969] 1 MLJ 32 had occasion to consider the issue of a resulting trust, and reference to the headnote would be sufficient: H

> The Johore Lumbering Co Ltd (incorporated in May 1941) was a family company in which all members of the family had shares. All payments in respect of the development of the oil palm lands were made by the company and all income from the oil palms was received by the company. The actual management was in the hands of the two defendants but they drew I

> remuneration from the company. Income tax in respect of the oil palm estate revenue was paid by the company, although it was declared to the Inland Revenue as the income of the defendants. The plaintiff claimed that she had given her brother the money to buy the oil palm lands and that the defendants had been appointed only to look after the lands. Azmi J, as he then was, held that YHE had held the estate as trustee for the plaintiff and that YHE had transferred it to the defendants as trustees for the plaintiff.
>
> The defendants appealed against this decision. In the Federal Court it was held (Thomson LP dissenting) that the plaintiff had failed to prove that the estate was in fact held by YHE in trust for her and no other and that the transfer to the defendants was at her request and they allowed the appeal. The plaintiff appealed to the Privy Council.
>
> **Held,** allowing the appeal:
>
> (1) the learned trial judge had found as a fact that the estate was held by YHE in trust for the plaintiff and this finding could not be disturbed unless (which was not the case) supporting evidence was lacking or if some factual misapprehension of evidence is shown;
>
> (2) the learned trial judge in this case had rejected the claim of the defendants that the lands were transferred to them by way of gift and therefore the plaintiff must succeed in this case, even though she had failed to show that the lands were transferred by YHE at her request.

In *Wan Naimah v Wan Mohamad Nawawai*, the Federal Court (Azmi LP, Suffian CJ and Ali FJ) also had occasion to adjudicate on the issue of a trust and Suffian CJ (as he then was) delivering the judgment of the Federal Court aptly said (at pp 41–42):

> With respect we agree with the learned trial judge that the plaintiff has produced evidence sufficient to prove that the defendant held that half undivided share in trust for him, and that therefore this appeal be dismissed.
>
> The law is that a declaration of trust may be made quite informally, provided that the words used are clear and unequivocal. As was stated by Romilly MR in *Grant v Grant* 55 ER 776, words declaring a trust:
>
>> 'need not be in writing ... They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, 'I hold the property in trust for you', nor is it necessary to say, 'I hold the same for your separate use'. Any words that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of shewing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness, except the donee present at the time the trust was created.' (p 777).
>
> The Master of the Rolls was speaking of a declaration of trust in respect of chattels, which may be created by parole, but as a trust in respect of land may be created in Kelantan also by parole (the English Statute of Frauds does not apply), we are of the opinion that the principle above stated is applicable to this case.

A In *Koh Ying Huat v Koh Kah Hing Sdn Bhd* [1992] MLJU 2, [1994] 3 CLJ 777, Abu Mansor Ali J (as he then was) had the privilege of adjudicating a case concerning a trust property. That was a case where the land was registered in the name of the eldest son and his wives, even though the petitioner's mother had financed the purchase of the land. Other family members continued to occupy the land. The court had to consider two issues. Firstly, whether the eldest son was holding the land in trust for the family. B Secondly, whether in the context of the old Chinese traditional family practice it was appropriate to apply a presumption of advancement in favour of the eldest son. This was what his Lordship Abu Mansor Ali J (as he then was) had to say (see p 779 of the CLJ report):

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> The issue that this court must resolve is whether it is reasonably true that the deceased Koh Chong Huat was holding the said land in trust and whether the company formed was a family company and whether the purchase of the said land by the company was for the family? In *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182 at p 188. Hashim Yeop A Sani J (as he then was), of trust, said: D
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> > 'It has been found difficult to give a satisfactory definition of a trust but it has been accepted that the most satisfactory definition is by Professor Keeton which definition is that a trust is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, real or personal, and whether by legal or equitable title, for the E benefit of some persons (of whom he may be one) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.'
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> In that case, it seems obvious in going through the evidence of the various F witnesses, it is really a matter of credibility. In the same case cited Chang Min Tat FJ said:
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> > 'The authorities establish that though the case for the claimants of a trust against a dead man needs no corroboration, it must be approached with suspicion.'
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> G However, in the event that the court can find, on the evidence, that there is a trust, then the court has to make the declaration prayed for and to give the required direction to give effect to the declared trust.'

And his Lordship rounded up the matter when he said (see pp 780–781 of the report):

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> I find merit in the argument of counsel for the plaintiff that the court should look at the whole of the evidence from the context of the family being an old Chinese traditional family. That being the case in the situation where the father was mentally sick and therefore the task of running the family business fell on the shoulders of the eldest son Koh Chong Huat. I accept this argument and in this way the deceased Koh Chong Huat had to account for all the I receipts to the mother and it was therefore consistent that the mother puts out the money to buy the land. I also adopted the case of *Neo Tai Kim v Foo Stie Wah* 4 PCC 405 where in an appropriate case, looking at the evidence as a

> whole, the Privy Council approved of the judges viewing the case, in the context of an old Chinese traditional family practice, held that it was inappropriate to apply a presumption of advancement to such a case. Similarly, applying this case, I hold that it is inappropriate to apply the presumption of advancement in favour of Koh Chong Huat. The circumstances in which Koh Chong Huat held the land militate against that interpretation.
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> Finally, in my view, in this particular case, the evidence of a close family friend, neutral to both sides, Lim Guan Swee ('SP5'), aged 74 whom the court regarded as the trustworthy witness who even had helped the family in their business by managing the family hotel, Hong Chew Hotel. SP5 confirms in close detail how this family business was conducted while the father was not well. He confirms that the land was bought with the money given by the mother of the plaintiff to the amount of RM12,000. I accept the evidence of SP5 that the said land was held in the name of Koh Chong Huat and his first and second wife in trust for the Koh family and later it was registered in the name of the defendant. I also agree with the argument of the plaintiff in the granting of this order, no re-transfer of this land is involved. The shares of the plaintiff and the other beneficiary will be reflected in the shares of the defendant. I also hold there has been no acquiescence by the plaintiff and the other beneficiary, who was a minor when the land was bought and held by (the) deceased Koh Chong Huat. It would be said he was a giant, so to speak, in the family hierarchy and it could not be expected of them to challenge the authority of the eldest son in family matters.
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> Finally having regard to all the evidence, on the balance of probabilitites, I find that the petitioner has succeeded in his petition and I duly hold that the land was held in trust by Koh Chong Huat for the Koh family and the company that was incorporated through Koh Chong Huat's efforts and their shares held in whatever denominations belong to the Koh family and held by the defendant for them.
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> I make an order in the terms what was prayed in this petition with liberty to petitioner to further apply for consequential orders with costs to the petitioner.

I must pause here for a while and take stock of the situation. It would be interesting to refer to the case of *Re Snowden (deceased) Smith v Spowage and Ors* [1979] 2 All ER 172, a decision from the Chancery Division by Sir Robert Megarry VC. In that case, the testatrix, an elderly widow living with a wealthy older brother, decided to change her will. The testatrix had no children and her nearest relatives, apart from her brother, were five nephews and nieces and 13 greatnephews and greatnieces. There was evidence that, although the testatrix had decided on a change of will so that one of her nieces would not receive all her residuary estate, she was not clear as to how her estate should be disposed of. According to the attendance note of the solicitor with whom she discussed the position, the testatrix thought that the easiest method of disposal would be to leave it 'to her brother to split up the remainder as he thought best'. The solicitor later deposed that the testatrix had told him that the residue should be left to her brother to distribute 'between her nephews and nieces equally' and that the brother 'could then see everybody and look after the division for her'. There was other evidence that the testatrix wanted 'to be fair to everyone' and that her brother 'would know what to do', and further that the brother had agreed 'to deal with everything' for her. Under the will, the residue of the testatrix's estate was left to the brother absolutely. The testatrix died six days after signing the will, and six days later the brother also died, leaving all his estate to his only son. One of the executors of the testatrix's will sought the determination of the court on how the residue of the testatrix's estate, amounting to some 20,000 pounds, should be distributed, ie (i) to the brother's son absolutely as the sole beneficiary of his father's estate, or (ii) to the nephews and nieces or alternatively, the nephews, nieces, greatnephews and greatnieces, on the ground that the testatrix's brother had taken the residue subject to a secret trust, and if so, in what shares. The court held that in the absence of fraud or other special circumstances, the standard of proof that was required to establish a secret trust was merely the ordinary civil standard of proof required to establish an ordinary trust. Applying that test, although the testatrix had executed the will on the basis of some arrangement between herself and her brother regarding the disposition of the residue, on the evidence it was merely a moral or family obligation imposed on the brother and not a secret trust, since there was no evidence that the testatrix intended the sanction of a court to enforce it if the brother failed to carry out her general wishes. The brother therefore took the residue free from any trust, and on his death it passed to his son absolutely. In the main judgment, Sir Robert Megarry VC had this to say (see pp 178–179 of the report):

> Now in the present case there is no question of fraud. The will directed the residue to be held in trust for the brother absolutely, and the only question is whether or not the beneficial interest thus given to him has been subjected to a trust, and if so, what that trust is. The trust, if it is one, is plainly one which required the brother to carry it out: it was he who was to distribute the money and see that everything was dealt with properly, and not the trustees of the will. There was thus no attempt to cancel the testamentary trust of residue for the brother and require the trustees of the will to hold the residue on the secret trust instead. Accordingly, I cannot see that rectification provides any real analogy. The question is simply that of the ordinary standard of evidence required to establish a trust.
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> A trust, of course, is a concept which imposes important obligations and confers important rights. I think that it is clear that the burden lies on him who contends that such a relationship has been established: see *Jones v Badley* (1868) LR 3 Ch App 362. However, where no question of fraud arises, and there are no other special circumstances, I do not think that the burden is any greater than the burden of establishing a contract or other legal relationship. It is true that there is American authority for saying that an oral trust of personalty must be proved by clear and convincing evidence; but it has also been said that there seems to be no good reason why the evidence need be stronger than is necessary in any other situation: see, for example, *Scott on Trusts* (2nd Ed, 1956) Vol 1, p 356. It is with that comment that I agree. Certainly I do not think that this view would have surprised Vaughan Williams LJ. In *Re Pitt-Rivers* [1902] 1 Ch 403 at p 407, without deciding 'how distinct the promise need be in order to induce the court to enforce that promise, and

the trust arising under it', he was content to dispose of the case on the footing of the question being merely whether the bargain was entered into. 'I do not', he said, 'look for any greater distinctness than one generally has to employ when one is asking one's self, apart from questions of the Wills Act, Aye or no, is the promise established here?' (I may say that Vaughan Williams LJ's discussion of the evidence which almost immediately follows this passage and is merely summarized in the law reports will be found verbatim in the report in the law journal (1902) 71 LJ Ch 225 at p 227).

I therefore hold that in order to establish a secret trust where no question of fraud arises, the standard of proof is the ordinary civil standard of proof that is required to establish an ordinary trust. I am conscious that this does not accord with what was said in *Ottaway v Norman* [1971] 3 All ER 1325 at p 1333, [1972] Ch 698 at p 712, but I think the point was taken somewhat shortly there, and the judge does not seem to have had the advantage of having had cited to him the authorities that I have considered. For those reasons, I have overcome my hesitation in differing from him. I cannot therefore dispose of the case summarily on the footing that a high standard of proof has plainly not been achieved, but I must consider the evidence in some detail to see whether the ordinary standard of proof has been satisfied. The initial question, of course, is whether the brother was bound by a secret trust, or whether he was subject to no more than a moral obligation.

In considering this, I have found considerable assistance in two passages in the judgment of the Court of Appeal in Ireland in *M'Cormick v Grogan* (1867) 1 IR Eq 313 at p 328, delivered by Christian LJ. Speaking of the testator in that case, he said:

> '... the real question is, what did he intend should be the sanction? Was it to be the authority of a court of justice, or the conscience of the devise? In my opinion, expressly and exclusively the latter.'

Then later he said in 1 IR Eq 313 at p 329 that if we could look into the thoughts of the testator as they were when he was writing the will and the letter that he left with it :

> 'I am persuaded that what we should find there would be a purpose to this effect — to set up after his decease, not an executor or a trustee, but as it were, a second self, whom, while he communicates to him confidentially his ideas as to the distribution of his property, he desires to invest with all his own irresponsibility in carrying them into effect.'

On appeal, this latter passage was cited with approval by Lord Hatherley LC (1869) LR 4 HL 82 at p 95, and the latter part of it was cited with approval by Stirling LJ in *Re Pitt-Rivers* [1902] 1 Ch 403 at p 409.

The facts of these two cases were very different from those in the case before me, but I think that the approach made by Christian LJ is of general application in this type of case. In both cases, I may say, it was held that no secret trust had been established. In answering questions such as those posed by Christian LJ, I take it to be clear law that those who seek to establish that a trust has been created, carry the burden of proof. If I may adapt the words of Lord Cairns LC in *Jones v Badley* (1868) LR 3 Ch App 362 at p 364, the onus of establishing that 'the testatrix, so far as her own mind and intention were concerned', gave her property to her brother in order that he

> might take, not beneficially, but as trustee, lies on those who contend that a trust exists. A
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> With that in mind, I have examined again all the evidence that is before me. Has it been sufficiently established that the testatrix intended to bind her brother by a trust, and make him a trustee of the beneficial interest in her residue? Or, on the other hand (to borrow the words of Lord Hatherley LC in *McCormick v Grogan* (1869) LR 4 HL 82 at p 95), did she intend to give her B brother 'full and complete control over the property', with her expression of wishes no more than 'a guide which might assist him in the discretion which he would himself exercise?'

And his Lordship summed it up in these words (see pp 180–181 of the report): C

> The general picture which seems to me to emerge from the evidence is of a testatrix who for long had been worrying about how to divide her residue and who was still undecided. She had a brother whom she trusted implicitly and who knew her general views about her relations and her property. She therefore left her residue to him in the faith that he would, in due time and in D accordance with her general wishes, make in her stead the detailed decisions about the distribution of her residue which had for so long troubled her and on which she was still undecided. He was her trusted brother, more wealthy than she, and a little older. There was thus no need to bind him by any legally enforceable trust; and I cannot see any real indication that she had any thought of doing this. Instead, she simply left him, as a matter of family confidence and probity, to do what he thought she would have done if E she had ever finally made up her mind. In short, to revert to the language of Christian LJ, I cannot see any real evidence that she intended the sanction to be the authority of a court of justice and not merely the conscience of her brother. I therefore hold that her brother took the residue free from any trust.
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> In those circumstances, nothing arises for decision on what would have been the meaning and effect of a trust for equal division between the nephews and nieces. There are obviously many possibilities. It might be said that it applied only to those to whom the will gave legacies, or only to those to whom no legacies were given. There would also be room for argument whether greatnephews and greatnieces, or those who had long lived in New Zealand, were included or excluded; and there would be possible issues between those G of the whole blood and those of the half blood, and as to whether any division should be on a stirpital basis or per capita. Nor need I discuss what the position would be if the brother had been bound by a trust, but the terms of the trust and the beneficiaries under it had been unascertained and unascertainable. Nevertheless, although I need decide nothing on these matters, I think I should say something which I hope may be of some H assistance to those concerned.
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> By the death of her brother so soon after her own death, before he had been able to carry out the obligations which in honour bound him, the intentions of the testatrix for the disposition of her residue have been defeated. As a matter of law, the first defendant is beneficially entitled to that residue absolutely; yet as a matter of conscience he takes it burdened with the I knowledge that his father was bound in honour to distribute it all in accordance with his knowledge of the general wishes of the testatrix. I do not

> know to what extent, if any, the first defendant was privy to his father's knowledge of those wishes. If, as seems at least possible, he had little or no knowledge, he may feel himself to be in some difficulty as to what to do, not, indeed, as a matter of law, but solely as a matter of conscience; and no doubt considerations of capital transfer tax may aggravate this difficulty. He is, of course, the only nephew or niece of the whole blood, and if in those circumstances he decided to retain for himself a substantial portion of the residue but to distribute the remainder among such of the testatrix's other relations as he thinks she would have wished, doing the best that he can on what he knows, then I would have thought that he could fairly regard himself as having discharged the moral obligations of his father, and that the rest of the family ought to take the same view.
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> Let me emphasize that I am not deciding that the first defendant is under any legal or equitable duty to do this; all that I decide is that he is beneficially entitled to the residue absolutely. It is entirely a matter for him what he does with it. But if his decision is on the lines that I have indicated, and some members of the family are inclined to cavil at it, then I think it is right that he, and they, should know that in my view he would be acting entirely honourably.
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> Having said that, all that remains for me to do is to answer the question in the originating summons in sense (a); and this I do.

That was indeed an interesting case nothing like the likes of the present case. That case dealt with secret trust whereas the present case was not concerned with secret trust. The present case revolved on an express trust and the evidence in support of such a trust, as I see it, came from both sides — the plaintiffs as well as the defendant. Be that as it may, I have kept an open mind and would look forward to the trial of the present case.

The plaintiffs were at pains to submit on the following points:

(1) that the first plaintiff contributed towards the cost of construction of the house through the common fund and that this was done from time to time when the first plaintiff started work which was shortly after the defendant commenced her teaching career;

(2) that the defendant did not pay for Kandasamy's share;

(3) that the defendant has failed to provide evidence of her contribution towards the cost of construction of the said property;

(4) that apart from the first plaintiff's monthly contribution towards the common fund from the inception of her teaching career in 1960, the first plaintiff has shown documentary evidence that she has, from time to time, taken loans on her mother's instructions to assist the family and to renovate the house;

(5) that the second plaintiff has also shown that he has been making monthly contributions of RM260 per month from 1967 to 1987 which has not been denied by the defendant; and

(6) that the second plaintiff has also given sums of money on an ad hoc basis to the late mother and the sum of RM10,000 to the late mother

> from his arrears of salary from the Harun Commission (which was denied by the defendant), and that the second plaintiff has also given a sum of RM5,000 each to the first plaintiff, the defendant and Saraswathy Devi (which was not denied by the defendant and therefore deemed admitted).

I merely took note of these submissions.

The 'without prejudice' letter dated 6 March 2000 as seen in exh 'NN27' of encl 14 that was reproduced in the early part of this judgment was objected to by the plaintiffs. It was argued on behalf of the plaintiffs that at no time was a copy of that letter ever extended to the plaintiffs' solicitors save and except for a statement that the defendant's solicitors have been communicating with Messrs Ramachandran & Reddy who were allegedly the previous solicitors for the first plaintiff.

It was submitted that the defendant's solicitors were notified that the first plaintiff was being represented by the first plaintiff's present solicitors and this can be seen in a letter dated 7 March 2000 marked as exh 'P2' of encl 4. It was submitted that although the letter in exh 'P2' of encl 4 was dated 7 March 2000 it was in fact dated 6 March 2000 and that the typographical error can be appreciated by looking at the defendant's solicitors that they were duly notified in exhibit 'P4' of encl 4 that the first plaintiff had not retained Messrs Ramachandran & Reddy to act for her. It was the stand of the plaintiffs that on 7 March 2000 when the plaintiffs filed for the ex parte injunction as reflected in encl 5, they proceeded without notice because the defendant and her solicitors had stated that they were going to forcibly evict the plaintiffs by 'extra judicial means'. This threat can be seen at para 13 of exh 'P3' of encl 4 and that threat was worded in this way:

> Our client has been advised that she is at liberty, after expiry of the notice given to take reasonable extra judicial measures to remove your client from the premises or to prevent your client from entering the premises because your client will rank as a trespasser per se.

It was emphasized by counsel for the plaintiffs that neither the plaintiffs nor their solicitors were in a position to inform this court of the offer that was made to the first plaintiff through Messrs Ramachandran & Reddy as that very offer was not known to either of them. This very offer was alluded to in the early part of this judgment and it was said to be an offer by the defendant to the first plaintiff to follow the defendant when the defendant moved to a new residence after selling the property. The letter of offer in exh 'NN27' was only made available to the court by way of an affidavit in encl 14 that was affirmed on 4 April 2000, and that letter of offer was reproduced verbatim in the early part of this judgment. It was submitted that since the defendant's solicitors had stated that they had been communicating with Messrs Ramachandran & Reddy, they should have extended a copy of the 'without prejudice' letter dated 6 March 2000 to the plaintiffs' solicitors and not attempt to steal a march on the first plaintiff by casting aspersions on her character by calling her a self confessed perjurer without first giving her the opportunity to explain the reason for making the statutory declaration at the full trial. It was submitted that the defendant's solicitors were assuming the role of a judge in regard to the conduct of the first plaintiff.

The plaintiffs submitted that there were no misrepresentations made in the statement of claim in regard to the impending threats. The threats were real and were conveyed by letters. Furthermore, it was submitted that why should the first plaintiff accept the defendant's invitation to move out with the defendant when the first plaintiff was entitled to reside in the property as a beneficial owner. It was submitted that the defendant, if not injuncted, would have sold the property at a huge profit at the expense of the other siblings of the family, including the plaintiffs and the defendant too would have dissipated the monies thereby frustrating the plaintiffs from recovering the same.

In writing this judgment, I have deliberated at length as to the facts that were alluded to at the ex parte stage and the facts that finally surfaced at the inter partes stage. Both sides hurled allegations against each other. This was basically a squabble of the siblings over the said property. The balance of convenience weighed heavily in favour of the plaintiffs. This was my judgment and I so hold accordingly.

It is now germane to set out the circumstances where evidence of 'without prejudice' communications may be given:

(1) in order to explain the passage of time in an application to strike out for want of prosecution (*Family Housing Association (Manchester) Ltd v Michael Hyde & Partners (a firm) & Ors*);

(2) 'when the justice of the case requires it' and 'to hold otherwise will encourage the suggestion of evidence which may prove what is false and the suppression thereof which may prove what is true' (*Lim Tjoen Kong v AB Chew Investments Pte Ltd*);

(3) the privilege may be waived by the person who is entitled to that privilege (*AB Chew Investments Pte Ltd v Lim Tjoen Kong*);

(4) no judge can restore a privilege that has been waived even though such waiver was mistakenly made (*Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors*);

(5) in certain circumstances, the 'without prejudice' correspondence may be looked at to determine the question of costs after judgment has been given (*Cutts v Head* [1984] 1 All ER 597).

A caveat must be placed. The lists of exceptions to the 'without prejudice' communications are not closed. It will certainly develop from time to time.

It was submitted that the letter of offer in exh 'NN27' of encl 14 was nothing more than a red herring. It was, pure and simple, an attempt by the defendant to evict the first plaintiff from the property and to deprive her of her beneficial interest over the said property. It was said that the first plaintiff was not even aware of the letter of offer as seen in exh 'NN27' of encl 14, and that being the case, the first plaintiff was unable to disclose the existence of that letter of offer to the court at the ex parte stage. To confound the matter further, the defendant's solicitors had failed to extend the copy of that letter of offer to the first plaintiff's current solicitors. The sum total of it all was this. That the plaintiffs were not misleading the court by not making available the notice of the alleged offer because the plaintiffs were not even aware of that offer.

It was emphasized that the plaintiffs have stayed in the said property since its construction in 1960 and that there was evidence that the property was a trust property held by the defendant for the siblings, including the plaintiffs. But the defendant was still adamant and held onto the notions that the plaintiffs were mere licensees who have since become trespassers and so the remedy of self help could be activated against the plaintiffs. In rebuttal, the plaintiffs argued that the remedy of self help was a devious method to evict the plaintiffs from the said property and to deprive them of their rights. It was said that the plaintiffs were retirees who have stayed in the house wherein the property stood for 40 odd years and now the said property has appreciated in value and was being offered for sale for a sum of RM2,900,000. Tempted by this lucrative offer, the defendant was said to have resorted to use force to evict the plaintiffs so that the defendant could sell the property and pocket the sum of RM2,900,000 to herself. But the learned counsel for the plaintiffs argued that the remedy of self help is no longer applicable in our country. In *Er Eng Hong & Anor v New Kim Eng @ Neo Kim* [1999] MLJU 605, [2000] 1 CLJ 289, the court said at pp 301–302 of the CLJ report:

> In Malaysia, the remedy of self help was alluded to by our courts in the following cases:
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> (1) *Sidek bin Haji Mohamad & Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313;
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> (2) *Majlis Amanah Rakyat (MARA) v Tan Seek Hong & Ors* [1994] 2 AMR 1296 at p 1302;
>
> (3) *Perumahan Farlim (Pg) Sdn Bhd & Ors v Cheng Hang Guan & Ors* [1989] 2 CLJ 967; [1989] 1 SCR 639; and
>
> (4) *Cahaya Ideal (M) Sdn Bhd v Orang-Orang Yang Menduduki Rumah Yang Ditanda Sebagai 'A3' Dan Didirikan Atas Sebahagian Tanah Yang Dipegang Di Bawah Hakmilik CT 2733 Lot 2103, Mukim Plentong, Daerah Johor Bahru, Negeri Johor* [1999] 1 CLJ 575.
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> But a note of caution must be registered here. The amended s 7(2) of the Specific Relief Act 1950 (Act 137) which came into force on 31 January 1992 by Act A 811 would relegate the remedy of self help into oblivion as the owner of the property can only seek to enforce his right to recover his property from the occupier by way of a court action. That s 7(2) of the Specific Relief Act 1950 (Act 137) enacts as follows:
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> > 'Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the

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> person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.'

By way of a rebuttal, the defendant argued that the plaintiffs were not tenants protected under s 7(2) of the Specific Relief Act 1950. My attention B was drawn to the case of *Marchant v Charters* [1977] 3 All ER 918 and the facts of that case may be stated as follows. Mrs Marchant owned a house in which there were seven bed-sitting rooms. She arranged for them to be let individually. Each one was simply furnished and was equipped with its own gas ring and grill, cooking utensils, crockery, cutlery, sink and hot water system so that the occupant could do his own cooking. There was a resident C housekeeper who cleaned the rooms daily and provided clean linen each week. The bathroom and lavatory in the house were shared by the occupants of the bed-sitting rooms. Mrs Marchant let one of bed-sitting rooms to Mr Charters for 7 pounds a week. Mr Charters thought that the figure was too high and applied to a rent officer under Part IV of the Rent D Act 1968 to fix a fair rent. The rent officer reduced the rent to 4.25 pounds a week and his decision was confirmed by the rent assessment committee. Mrs Marchant gave Mr Charters notice to quit and took proceedings in the county court to have him evicted. The county court judge held that although Mr Charters had a 'tenancy' within s 1(1) of the Rent Act 1968, he was, by virtue of s 2(1)(b)(3) of the 1968 Act, not entitled to protection E under that Act since the rent included services which were by no means minimal'. Accordingly, he made an order for possession. Mr Charters appealed. It was held by the Court of Appeal (Lord Denning MR, Orr and Waller LJJ) that the appeal should be dismissed for the following reasons:

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(a) the test whether the occupant of a single room was a tenant or licensee did not depend on whether he had exclusive occupation, whether the room was furnished or whether the occupation was permanent or temporary. Those were all relevant factors but none was conclusive. The true test was the nature and quality of the occupation: whether it G was intended that the occupier should have a stake in the room or whether he only had permission for himself to occupy the room personally, whether under a contract or not. Applying that test to the circumstances of the case, Mr Charters was not a tenant but a contractual licensee and so was not entitled to security of tenure under the 1968 Act;

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(b) even if there was a tenancy, the judge's finding that the amount of rent paid for services was 'by no means minimal' amounted to a finding that 'the amount of rent fairly attributable to attendance (ie the service provided by Mrs Marchant for the benefit or convenience of Mr Charters in his use or enjoyment of the room), having regard to I the value of the attendance to the tenant, formed a substantial part of the whole rent', within s 2(3). On the facts there was no ground for saying that that finding was wrong.

Lord Denning MR, delivering the judgment of the Court of Appeal, with whom Orr and Waller LJJ concurred, aptly said at pp 921–923:

> Applying those provisions to the present case, there are two questions to be considered. First, was Mr Charters a tenant? Was this one room let to him as a separate dwelling? If not, he had no protected tenancy. Second, if he was a tenant, was the attendance given sufficiently substantial to deprive him of protection? The county court judge decided the first question in favour of Mr Charters. He held that he was a tenant. But he decided the second question against Mr Charters. He held that the rent included services which were by no means minimal'. So he made an order for possession.
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> In order to describe the facts, I will now read Mrs Marchant's evidence:
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>> 'I go to [the house] practically every day. I occasionally sleep there. [It] is a fine old house: a self-catering residential hotel for single men. Been running like this for 25 years. Each resident has a room of his own. They are completely furnished, wall to wall carpeting, curtains, bed, blankets, sheets, pillow, pillow case, towels, even tea towels, one arm chair and two wooden chairs, wardrobe, occasional tables, cooker, sink, with gas water heater, gas fire for heating, points for power. Each room has its own meter for gas and electricity. Every resident gets daily cleaning of room, clean linen weekly, bathrooms are common. They can get an evening meal by arrangement with housekeeper, they pay her. She is engaged on basis that she will provide food if required. All rooms are provided with cutlery, crockery, and cooking utensils, all that is necessary. They can also get breakfast and lunch. Through the years, I find more and more people are providing their own meals. The housekeeper keeps the money for the food she provides.'
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> On that evidence the final question is, was Mr Charters a tenant or only a licensee? The law on this subject has been developed greatly in the last 25 years. I might almost say revolutionized. In 1952, I collected several of the cases in *Errington v Errington* [1952] 1 All ER 149, [1952] 1 KB 290, and since that time there have been many more. The difference is very important under the Rent Acts (including the 1974 Act) because a tenant is given complete security of tenure, but a licensee is not. There are four or five cases, somewhat like the present, to which we have been referred. The first is *Appah v Parncliffe Investments Ltd* [1964] 1 All ER 838, [1964] 1 WLR 1064. A house had been split up into 17 different rooms, each with its own Yale lock and key. The rooms were furnished. No meals were provided, but the rooms were cleaned daily and beds made. Fresh linen was provided. A lady took one of the rooms but, owing to the negligence of the owners, someone was able to break into her room and steal her belongings. It was held that she was not a tenant but a licensee for reward; and so able to sue the owner for negligence.
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> The next case is *Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 All ER 352, [1968] 1 WLR 374. A charitable society had converted a big house into an old people's home with 12 rooms. They let one of the rooms unfurnished to an old man of 85. He furnished it himself. The society provided food in a common dining room and so forth. There was a resident housekeeper. It was held that the old man was only a licensee and not a tenant. So he was not protected by the Rent Act and had to go.

The nearest case to the present case is *Luganda v Service Hotels Ltd* [1969] 2 All ER 692, [1969] 2 Ch 209. A student was reading for the Bar. He took a furnished room in a building called the Queensborough Court Hotel. There were 88 rooms. They were said to be 'let' out to tenants. Every student had a Yale key for his room. It was a bed-sitting room with a double gas ring. He got his own meals and provided his own towels and soap. The chambermaids came in every day and made the bed and cleaned the room. Every week they changed the linen. It was held that he was a contractual licensee and not a tenant (see [1969] 2 All ER 692 at p 695, [1969] 2 Ch 209 at p 219). But as he had applied to the rent tribunal, he was protected for a limited period from being evicted.

The next case arose under the Planning Acts. *Mayflower Cambridge Ltd v Secretary of State for the Environment* (1975) 30 P & CR 28. A building in Cambridge had been erected for students to stay in, but it was not needed for them. So it was used for visitors who wanted to come to Cambridge. The question was whether the change of use was to a hotel. Lord Widgery CJ said (30 P & CR 28 at p 32): 'The essence of a hotel is that it takes transient passengers'. That may well be a test under the Planning Acts but it is not a test for seeing whether there is a tenancy or a licence.

The last case is *R v South Middlesex Rent Tribunal, ex parte Beswick* [1976] *The Times*, 25th March. A young lady lived in a single room at a YWCA hostel. It was a furnished room. It was her sole home. She was permanent, not temporary. In common with other residents, she had the use of a kitchen, dining room, living room, laundry room, bathroom and toilet. It was held that she was not a tenant but a licensee. So the fair rent was to be fixed, not by the rent officer, but by the rent tribunal.

Gathering the cases together, what does it come to? What is the test to see whether the occupier of one room in a house is a tenant or a licensee? It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?

Looking at the position in this case, in my opinion Mr Charters was not a tenant of this one room. He was only a licensee. A contractual licensee, no doubt, but still only a licensee. So he does not have security of tenure under the Rent Acts. He is not protected against eviction. On this point, I differ from the judge. It is sufficient for the deciding of this case. Mr Charters has no right to stay.

This decision has its bearing on another aspect of the case. Mr Charters, as I have said, applied to the rent officer to register a fair rent; and from the rent officer it went up to the rent assessment committee. That would have been the appropriate procedure if he had really been a tenant. It comes under Part IV of the Rent Act 1968. But it was not the appropriate procedure if he was only a contractual licensee of a furnished room; for in that case he should have applied to a rent tribunal under Part VI of the Rent Act 1961.

> Mrs Marchant took this very point before the rent officer and the rent assessment committee. But they overruled her, holding that Mr Charters was a tenant. Mrs Marchant has, I understand, applied to the Divisional Court to get the matter put right. If he is only a licensee, it does appear that it was for the rent tribunal and not for the rent officer. But I would point out that, if he did go to the rent tribunal, that tribunal has power under Part VI to give him security of tenure for a time, not exceeding six months.

Of course, factually speaking, the case of *Marchant v Charters* can readily be distinguished. That case dealt with the issue of whether a person who occupied a room was a tenant or a licensee. Here, the plaintiffs raised the issue of the property being a trust property while the defendant argued that the plaintiffs were mere licensees, and it was even argued that the plaintiffs were mere trespassers. Here too the plaintiffs argued that they were beneficial owners to the said property.

Reference was also made by the defendant to the case of *Mayor, Aldermen and Burgesses of the Borough of Southgate v Watson* [1944] 1 All ER 603, a decision of the Court of Appeal (Scott, MacKinnon and Luxmoore LJJ). But, with respect, that case dealt with a landlord and tenant relationship which arose out of a homeless person being placed in possession of a vacant house requisitioned by the local authority and the Court of Appeal held that no tenancy was created and the appellant was not entitled to the protection of the Rent Acts. In a short judgment, Scott LJ delivering the judgment of the Court of Appeal, with whom Mackinnon and Luxmoore LJJ agreed, said (see pp 603–604 of the report):

> In this case, a house had to be requisitioned under the Defence (General) Regulations by a borough or, rather, by the competent authority, the clerk of that borough. The question in the case was and is, whether that competent authority had power under the Defence (General) Regulations to create a tenancy, turning himself into a landlord and making the person who was put into the house, because he had by enemy action lost possession of his own, a tenant.
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> The county court judge gave a very simple, short and entirely sound judgment, saying that no tenancy had been created, and the appeal is from that judgment. I think it was entirely right.
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> The ground of defence put forward is that if the tenancy was created, as contended, the house being of a rateable value within the Rent and Mortgage Interest Restrictions Act 1939, the appellant, as a person accommodated by the local authority, acting as competent authority, by the use of these requisitioned premises, thereby became a tenant within the meaning of the Rent and Mortgage Interest Restrictions Act, so that he gained the right to remain there until turned out pursuant to those Acts. It would have been a great injustice to the owner of the house, but that is neither here nor there. It is quite clear that no tenancy was created and that defence, the only defence, entirely fails. The appeal must be dismissed with costs.

On the issue of whether damages would be an adequate remedy for the plaintiffs, the case of *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408, a decision of the Supreme Court (Hashim Yeop A Sani

A CJ (Malaya), Mohamed Yusoff and Gunn Chit Tuan SCJJ) immediately comes to the forefront. In that case, Hashim Yeop A Sani CJ (Malaya) (as he then was) speaking for the Supreme Court, had this to say at p 409 of the report:

> But it would seem quite clear that the most important factor to consider as a B matter of principle is the question of whether in lieu of the injunction, damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the court acts upon the principle of preventing irreparable damage. As Lindley LJ said in *London & Blackwell Rly Co v Cross* (1886) 31 Ch D 354 at p 369:
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> > C 'The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy.'
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> The respondents in their counterclaim sought for the return of the $90,000 as the sum allegedly paid towards the purchase of the machine and damages and interest. It is clear therefore that this is a case where, even holding the defendants to their counterclaim, damages would be an adequate D remedy. Therefore, the injunction was in our view not properly granted. In a case like this it would be more appropriate to order an early hearing of the application to strike out the counterclaim and the application for summary judgment rather than to grant the injunction. Appeal allowed with costs.

E Here, however, on the available affidavit evidence, damages will not be an adequate remedy because the family property would have been disposed off and the proceeds dissipated by the defendant.

Conclusion

F The balance of convenience tilted in favour of the plaintiffs and, for the reasons adumbrated above, I gave an order in terms of encl 11, prayer (1) thereto, ie until the full disposal of the hearing of the civil suit or until otherwise directed by this court. I too granted prayer (2) of encl 11 thereto. In short, I extended the ex parte order of this court dated 20 March 2000 G and I too gave an order in terms of the inter partes application in encl 11. Apart from these, I made an order that the hearing of this case be given priority. I then directed the parties to comply with O 34 r 4(2)(a) to (m) of the RHC and with O 35A rr 1 and 2 of the RHC. I was magnanimous and I gave the parties the dates for the hearing of the civil suit which was from 18 June 2001 to 22 June 2001 and extending to 25 June 2001 until 29 June H 2001 but, the parties declined the offer.

On 18 September 2001, the case was again case managed under O 34 r 4(2)(a) to (m) of the RHC as well as under O 35A rr 1 and 2 of the RHC. The next case management date was then set on 15 October 2001. I must put on record that the case management has proceeded smoothly and the I parties have cooperated in many ways to make the case management a success. Once again, the hearing dates for this case were set out by me with the concurrence of the parties and the dates for the hearing of this civil suit would be held on 12 August 2002 to 16 August 2002 and it would extend to 26 August 2002 until 30 August 2002.

Plaintiff's application allowed.

Reported by Lim Lee Na